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Raymond K. Berg

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# CRIMINAL PROCEDURE: FRANCE, ENGLAND, AND THE UNITED STATES

RAYMOND K. BERG

## INTRODUCTION

**I**N MANY countries today, traditionalism plays a great part in the policy of their criminal procedure. As a corollary of such traditionalism, popular misconceptions and vague notions prevail which often serve to hamper the achievement of better criminal procedure and further disguise and confuse the real problems of our systems. The general use of such words as "justice," "liberty," or "freedom" cannot by itself solve problems nor can the general idealism of a given philosophy untangle a particular, concrete problem. Misconceptions of accepted principles such as the "privilege against self-incrimination" or "the presumption of innocence" have an emotional content which can often defeat the rational approach of progress. Further, as criminal procedure became more complex through the years, many separate and distinct principles of evidence and procedure which developed logically became illogical in application and result when they became involved or in conflict with other principles. Worse, many of these principles are today archaic in that the reasons for their existence have long since disappeared.

Change comes hard to traditionally minded nations. Therefore, it is felt that a historical development and clarification of certain principles as well as criminal procedure in general will act to pave the way for such change. Instead of approaching change in terms of ideals, the historical, analytical approach will be used, picking up certain of the principles in their proper places as they arose in history and bringing them down to date together with all entanglements and conflicts. By comparing English, French and American systems which all began basically in the same way, a more complete understanding can be gained of each system whose mistakes and advantages will then become more obvious. It cannot be denied that such comparative study may also aid in the furtherance of uniform law among the nations of the world through understanding and appreciation which in turn will aid the achievement of world peace.

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*MR. BERG is a member of the Illinois Bar. This article is the result of a year's study at Cambridge, England. Mr. Berg received his J.D. from De Paul University in 1957.*

Criminal procedure began in vengeance. Physical force, the natural way of redressing private wrongs was employed directly against the offending person or thing. Then, as men grouped together in small families or communities, a man's kindred became his avengers, giving rise to the oft heard of "blood feuds." But, when these small groups developed into large tribes, feudal kingdoms and states, private revenge was necessarily harnessed for the welfare of the whole. It is here that the true beginnings of criminal procedure are found because in regulating private revenge, some method for determining the guilt or innocence of an accused man had to be found. Since logically the accused should know better than anyone else whether he was guilty or innocent of an accused wrong, the search for and development of a method of trial necessarily involved some action on his part. In earlier days he was often put to an ordeal or perhaps proof would be in the form of trial by battle or in some cases by his own testimony under oath. In a sense it is probably better to refer to these methods as "proofs" rather than as "trials" since the accused was calling on God to witness his innocence.

Today, great importance is still placed upon the testimony of the accused and the history of his role in criminal procedure is one of interest marked with the birth and interplay of some of the greatest principles in evidence and criminal procedure. Therefore, though an attempt will be made to survey the historical development and present-day comparison of the English, French and American systems, a greater part of study will be devoted to the testimony of the accused.

#### FRENCH HISTORICAL BACKGROUND

##### EARLY FRENCH PROCEDURE

In the most primitive German society, the familiar pattern of vengeance was present whereby each person acted as judge and executioner. The individual was the protector of his own rights by whatever power he possessed and was in the same manner, the avenger of his wrongs. Slowly society imposed restrictions on private revenge. An injured person was forced to submit his cause to a tribunal or he was forced to accept payment in recompense for injury. Society became organized so that all free men were in pledge to report crimes which in turn helped to preserve the peace and prevent private revenge.<sup>1</sup>

<sup>1</sup> Ploscowe, Development of French Procedure, 23 J. Crim. L. & Criminology 372, 437 (1932). Esmein, A History of Continental Criminal Procedure, pp. 30, 31 (Bost.,

The earliest tribunals were a kind of popular assembly to which all free men had the right and duty to attend. Justice, as in Greece, was democratic. Later, a group of wise and experienced men called the Schöffen were organized who passed judgment in an increasing number of cases.<sup>2</sup> In these early days any private accusation amounted to a challenge and the accused, perhaps as a concession to the earlier days of private vengeance, would have the right to trial by battle. This was considered one of the most esteemed methods of calling for the intervention of God.<sup>3</sup> Proceedings other than trial by battle were oral. The accuser and accused were bound to a strict formula where a slip of the tongue would be fatal. In less serious offenses, the accused could clear himself by his oath. In more serious cases, his oath was strengthened by fellow-swearers or compurgators who pledged their persons and their salvation as security for the correctness of the assertion of their party. If the accused was not oathworthy, or could not obtain a sufficient number of compurgators, he would have to submit to one of the ordeals. It is clearly seen that the religious element permeated every method of proof.<sup>4</sup>

The first break away from private accusations occurred when an individual was caught in a criminal act or after pursuit. He could be executed on the spot by those who had caught him.<sup>5</sup> Public officials then began holding malefactors who had not been accused, on suspicion and then calling on the victim or his relatives to accuse the man.<sup>6</sup> The Carolingian kings instituted a system of interrogation for discovering criminals. Previously they had interrogated communities under oath in order to settle financial and governmental disputes and so they began using the same method to interrogate the community for criminals.<sup>7</sup> In this type of accusation which may be termed an indictment, the accused still had to clear himself by the accepted modes of proof (except for trial by battle since there was no private accuser to do battle with).

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1913.) It may be said that the growth of the conception of a crime against the civic community as well as the fact that the public authority shared in the fine contributed to this limitation on private revenge. This same development, as will be shown, took place in England.

<sup>2</sup> Ploscowe, *ibid.*, at pp. 438, 439; Esmein, *ibid.*, at pp. 32-34.

<sup>3</sup> Esmein, *ibid.*, at p. 59.

<sup>4</sup> Ploscowe, *ibid.*, at pp. 439, 440; Esmein, *ibid.*, at pp. 56-60.

<sup>5</sup> Ploscowe, *ibid.*, at p. 441; Esmein, *ibid.*, at p. 61.

<sup>6</sup> Esmein, *ibid.*, at pp. 62-64.

<sup>7</sup> Ploscowe, *op. cit. supra* note 1, pp. 441, 442; Esmein, *ibid.*, at pp. 64-68, 94-99.

## ECCLESIASTICAL PROCEDURE

In feudal times there were royal courts, municipal courts, seigniorial courts and ecclesiastical courts. Their varying jurisdictions were gradually encroached upon by the royal courts with the growth of the state, so that eventually their jurisdictional powers were virtually absorbed.<sup>8</sup> However, the effect and influence of the ecclesiastical courts upon subsequent criminal procedure is of great importance and therefore must be considered separately. In discussing ecclesiastical procedure two very important factors must be kept in mind. First, the early Church was highly organized and centralized with many educated men to occupy various positions in the hierarchy. Secondly, the Church fathers were great students of philosophy who believed in the reason of man and the rational way of doing things. They therefore modeled early ecclesiastical procedure upon the Roman accusatorial procedure because it seemed the rational way of discovering the guilt or innocence of the accused. As centuries passed and the dark ages descended the influence of the barbaric tribes and customs of the people began to affect ecclesiastical procedure. Finally, during the Carolingian period, the Church gave up the rational Roman method of trial and in its stead adopted the irrational methods of trial used customarily by the people. Though there was much opposition, the Church began to try men by oath and ordeals.<sup>9</sup> About 800, the Church introduced something new into its procedure. When a crime was suspected by public opinion the accused became obliged to exculpate himself and if he failed to do so, he was convicted and sentenced.<sup>10</sup> From this beginning, there developed an inquisitorial system which culminated in the Lateran Council of 1215 and the Decretals of Pope Innocent III which were passed to repress heresy and scandalous conditions in the clergy.<sup>11</sup> It became the duty of the judge to make a secret investigation when there were public rumors that someone subject to ecclesiastical law had committed a crime. The accused and anyone believed to have any knowledge of the crime were interrogated under oath.<sup>12</sup> Since the Church was very highly organized and centralized, it is easy to understand why such procedure was adopted. If, for example, a Bishop heard some rumor regarding someone under

<sup>8</sup> Esmein, *ibid.*, at pp. 48-54.

<sup>9</sup> Ploscowe, *op. cit. supra* note 1, p. 447.

<sup>10</sup> Esmein, *op. cit. supra* note 1, pp. 79, 80.

<sup>11</sup> Ploscowe, *op. cit. supra* note 1, p. 447; Esmein, *ibid.*, at p. 81.

<sup>12</sup> Ploscowe, *ibid.*, at p. 447.

his authority, what would be more logical and rational than calling in the person in question and asking him whether the rumor was true or false. Later, instead of public rumor, the same procedure was employed upon the charge of an individual or a "denunciation" as it was called.<sup>13</sup> It was about this time that scholars discovered that later Roman law authorized such procedure as well as torture.<sup>14</sup>

Parallel to this development in the ecclesiastical procedure, the existing modes of proof were falling more and more into disfavor. The growth of trade and commerce rendered ineffectual the oath and compurgation which had worked so well in the intimate life of the community. The Church having adopted ordeals with much opposition became completely dissatisfied and banned them in 1215. Trial by battle also fell into disuse and was forbidden in France in 1260 and in Germany in 1290.<sup>15</sup> At the same time private accusations, that is those brought by an individual, were giving way to public accusations, those brought upon inquiry of the community, in increasing numbers.<sup>16</sup>

The 13th century saw new wealth through increased commerce business and trades. Towns, cities and states became stronger and more complex. Royal jurisdiction was encroaching more and more upon the jurisdictions of other courts in order to maintain unity, centralization and strength. A spirit of the state and nationalism was beginning to grow. Men were reading about the classical days of Greece and Rome, rediscovering their cultures, philosophies and governments. At the same time, crime was increasing and becoming more difficult to suppress. This lawlessness was of great danger to the state and new systems had to be devised for the discovery, suppression, prosecution and trial of crimes. Of major importance was the trial of an accused person because when the primitive methods of trial were abolished, states found themselves with no way of trying an accused person. In light of the success of the Church's inquisitional procedure and the fact that the Romans had used a similar kind of procedure, it is not surprising to find this inquisitional system adopted by lay courts throughout the continent.<sup>17</sup>

#### THE INQUISITIONAL SYSTEM

France adopted a facsimile of Church procedure in the 1200's. Such proceedings were known as an "apprise" and allowed the judge to in-

<sup>13</sup> Esmein, *op. cit.* supra note 1, p. 85.

<sup>14</sup> Ploscowe, *op. cit.* supra note 1, pp. 447, 448.

<sup>15</sup> Ploscowe, *ibid.*, at pp. 442, 443.

<sup>16</sup> Ploscowe, *ibid.*, at pp. 443, 444.

<sup>17</sup> Ploscowe, *ibid.*, at p. 448.

terrogate the accused and witnesses of a crime of public notoriety. The accused would be punished under a theory which was merely an extension of the older principle which allowed summary execution when the accused was caught in the act.<sup>18</sup> The "apprise" led to the "denunciation," again a copy of Church procedure, whereby a person could make a complaint to a judge who would then prosecute officially.<sup>19</sup> In a short time, torture was introduced into these inquests. Why torture was used is hard to explain. The fact that the later Romans had used torture was of great influence. Also, the "apprise" had been primarily based on the testimony of a sufficient number of witnesses. If these witnesses failed, the only manner left of convicting the prisoner was his own confession and thus, torture could have been used primarily for this purpose. A confession by the accused had always been looked upon as the highest form of conviction and perhaps the extreme desire to gain a confession, even by torture, was the result of a psychological necessity upon the part of the judge to be sure that the accused, whom he felt was guilty, was in fact guilty.<sup>20</sup>

Historically, the king's procurators were originally men of business who among their duties supervised the collection of fines, a principal source of revenue to the king. Because of the fines involved in criminal cases and because the king wanted to keep the prosecution of crime under his supervision, it was arranged for these procurators to constitute themselves parties in criminal actions on behalf of the king. They became a kind of official denunciator intervening in all prosecutions. These men were the nucleus of what today is known as the public prosecutor.<sup>21</sup>

This inquisitorial procedure was enacted into law by ordonnances in 1498<sup>22</sup> and 1539.<sup>23</sup> It was finally codified by the Ordonnance Crimi-

<sup>18</sup> Esmein, *op. cit.* supra note 1, pp. 94-99.

<sup>19</sup> Esmein, *ibid.*, at pp. 99-101. The denunciation became particularly popular because by this method an accuser could avoid duels.

<sup>20</sup> Esmein, *ibid.*, at pp. 107-114.

<sup>21</sup> Esmein, *ibid.*, at pp. 114-118.

<sup>22</sup> The ordinance of 1498 distinguished between "ordinary" and "extraordinary" procedure. "Ordinary" procedure took place in public; torture was not employed and it allowed the accused an unfettered defense. It was employed when there was an accusation by a formal party. "Extraordinary" procedure allowed torture and was conducted in secrecy with little defense. This procedure was used in heinous crimes when the accused was under suspicion. Esmein, *ibid.*, at pp. 126-130, 145-148.

<sup>23</sup> The ordinance of 1539 divided the action into examination and judgment. Everything was in writing and everything was secret. Upon complaint, inquiry or information the accused was interrogated immediately by the judge without counsel and without any information of the charge. He was confronted by witnesses and was allowed at that time only to make objections or contest the charge. If the offense was

nelle of 1670 which governed French criminal procedure down to the revolution. Upon complaint of a private individual or the king's prosecutor, the investigating magistrate investigated the crime by secret interrogations, inspections and inquiries. He could then order the accused to be brought before him for interrogations which were in secret and without counsel. Then the witnesses were summoned before the magistrate and questioned again. After this, the accused was confronted with the witnesses. It was his sole chance to make objections. During this whole preliminary stage, the king's prosecutor was present. The trial itself was in secret before 7 judges. The accused was interrogated by the presiding judge and then the whole report of the preliminary investigation was read. Thus, the judges passed judgment on this second-hand evidence. Torture was still allowed under the Ordonnance.<sup>24</sup>

#### THE ADOPTION OF ENGLISH CRIMINAL PROCEDURE

Protests against the brutality of this procedure were heard shortly after its enactment but it was not until the great movement in philosophy began which had as its battle-cry, reason, toleration and humanity, that criticism grew in fury. For 50 years prior to the adoption of English criminal procedure by the Constituent Assembly in 1791, legal and philosophical thinking had been directed towards England where the "men of reason" in France and finally the public in general, saw a practical procedural system incorporating their principles and ideals.<sup>25</sup> Therefore, when public opinion demanded reform in criminal procedure, it was only natural that the legislators would turn to England for a model. In adopting English procedure the task proved difficult because to begin with, the two systems were quite diverse. France had no jury or grand jury. Their prosecution was entirely in the hands of a public prosecutor while private parties could only sue for damages. England still maintained the private prosecutor. In

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nearly verified and only a confession lacking, torture could be applied. In some cases the accused was allowed to bring in justificative facts when the prosecution rested. After the examination, the matter was brought before the assembled bench and the accused was interrogated by the whole court who were to judge him. Esmein, *ibid.*, at pp. 148-159.

<sup>24</sup> Ploscowe, *op. cit. supra* note 1, pp. 449-453; Esmein, *ibid.*, at pp. 218-236.

<sup>25</sup> Their greatest interest lay in the English jury system whereby an accused person was tried by 12 of his countrymen, Esmein, *ibid.*, at p. 408.



France, the preliminary investigation was the main part of a man's trial. In England, the examination prior to trial, entrusted to justices of the peace, did not amount to much. In France, writing played a preponderant part, actions being judged mainly on written documents. English procedure was oral. England had particular rules of evidence, France had very few. It seemed quite plain to the legislators that France would have to revolutionize its whole system and so they sacrificed their traditional institutions and provided for the wholesale importation of English criminal procedure.<sup>26</sup>

However, the French were so steeped in their own tradition and usage that they could not in effect adopt the English system. After centuries of a logical and rational method of discovering truth, the introduction of a jury was an unwelcome intrusion which proved ineffectual in the French environment. Often, the French philosophical sense of humanity swayed the juries' sense of justice into a feeling of sympathy for the accused. Often, jurors were threatened and bribed which resulted in frequent miscarriages of justice. The preliminary investigation, once the strong point of French criminal procedure, had become enfeebled and thus cases were badly prepared and poorly prosecuted with the result that many criminals were acquitted. At this time, crime and political passion were ravaging France and the people were not so much concerned with individual liberty as they were with security. Thus, France in this period of crisis, necessarily amended its system more in keeping with its older traditional methods.<sup>27</sup>

When Napoleon came into power, England had become France's enemy and thus it was quite natural to find people looking unfavorably at the English system. Napoleon, desiring to centralize and strengthen his government wanted to do away completely with the system and return to the Code of 1670 which would help achieve this aim. Public opinion mounted, which together with Napoleon's influence resulted in the Code of 1808.<sup>28</sup>

<sup>26</sup> In adopting the jury they varied it from the English model. They also varied the system of legal proofs allowing jurors to decide on their own "personal conviction." Jurors were not allowed to give a general verdict but answered yes or no to specific questions. The jurors were also allowed to give a decision by majority vote in contrast to the English rule of unanimity. The preparatory examination was also reduced to a mere trifle. Ploscowe, *op. cit. supra* note 1, p. 377; Esmein, *ibid.*, at pp. 409, 415-419.

<sup>27</sup> Ploscowe, *ibid.*, at p. 378; Esmein, *ibid.*, at pp. 437, 450, 451.

<sup>28</sup> Ploscowe, *ibid.*, at p. 379; Esmein, *ibid.*, at pp. 465-476.

## ENGLISH HISTORICAL BACKGROUND

## EARLY PROCEDURE

Early England was invaded successively by Angles, Saxons, Jutes and Danes who brought with them their Germanic customs.<sup>29</sup> Therefore, the development of criminal procedure in England was very similar to the development in early Germanic Society. Private revenge was first limited by the alternative of accepting a fitting compensation. Then the acceptance of a compensation was made compulsory.<sup>30</sup> Finally, as the personal dignity of the king increased, the concept of a crime against the king was created. It became unlawful to break the "king's peace"<sup>31</sup> and such violation resulted in a fine. This fine was incentive enough, besides the desire for centralization, for the early kings to enlarge the jurisdiction of the royal courts.

The early kings had their kingdoms (shires) divided into counties. The county was divided into hundreds and the hundred was divided into vills or townships.<sup>32</sup> Through a system of organization, the king kept every man in pledge by groups of ten to report crimes and to act as sureties for those in their pledge group.<sup>33</sup> Procedurally, as in the Germanic societies, there was a growth from direct vengeance into a system of composition and summary justice and finally into a method of accusation and trial. Later Anglo-Saxon law allowed accusations to be made by a committee of the *witan* or by four men and a *reeve* of a township or by a private accuser.<sup>34</sup> Once a man was accused under

<sup>29</sup> Plucknett, *A Concise History of the Common Law*, pp. 7-10 (4th ed. London, 1948); Stubbs, *The Constitutional History of England*, Vol. I, p. 11 (Oxford, 1887); Pike, *A History of Crime in England*, Vol. I, p. 41 (London, 1876).

<sup>30</sup> The compensation or fines were called *wer*, *bot* and *wite*. The *wer* was the price of a man's life according to his rank. The *bot* was compensation paid to a man for his injuries. The *wite* was a fine paid to the king or lord in respect of an offense. Pollock and Maitland, *The History of English Law*, Vol. I, pp. 44-48, 450, 451 (2d ed. Cambridge, 1911); Stephens, *A History of the Criminal Law of England*, Vol. I, p. 57 (London, 1863); Pike, *ibid.*, at pp. 41-45.

<sup>31</sup> Pollock & Maitland, *ibid.*, at Vol. I, pp. 44-46; Stubbs, *op. cit. supra* note 29, Vol. I, pp. 198-202; Stephens, *ibid.*, at Vol. I, pp. 184, 185.

<sup>32</sup> Holdsworth, *A History of English Law*, Vol. I, p. 5 (Bost., 1927); Stubbs, *ibid.*, at Vol. I, pp. 76, 77, 88, 103-124; Stephens, *ibid.*, at Vol. I, p. 65.

<sup>33</sup> This system of pledge was known as *fri-borg*, *frank-pledge* or *tithing*. If one man of the tithing committed an offense, the other nine had to produce him for trial or make good the damage and pay a fine. Allen, *Law in the Making*, p. 262 (4th ed. Oxford, 1946); Holdsworth, *ibid.*, at Vol. I, pp. 13-15; Stubbs, *ibid.*, at Vol. I, pp. 91-96; Stephens, *ibid.*, at Vol. I, pp. 65-67; Pike, *op. cit. supra* note 29, Vol. I, pp. 57-61.

<sup>34</sup> The *witan* was a representative council of the kingdoms. A *reeve* was an official somewhat like a bailiff who later became known as the sheriff (Shire-reeve). Stephens, *ibid.*, at Vol. I, pp. 68, 69.

Anglo-Saxon law, he was tried as in the Germanic system by compurgation or ordeal depending on the character of the accused. Trial by battle was never used by the Anglo-Saxons. The Anglo-Saxon and Germanic methods of trial were not really trials in the modern sense of the word, but merely methods of proof.<sup>35</sup>

William the Conqueror and his sons did not change the system of courts as developed by the Anglo-Saxon kings, but they did increase their royal jurisdiction and unify England.<sup>36</sup> In 1166, the Assize of Clarendon was issued by Henry II which provided that sheriffs and justices should make inquiry upon oath of 12 men of every hundred and 4 men of every township, whether any man in the township was a thief. The man so accused was brought before the sheriffs and by them before the justices. This was obviously a carry over from the Germanic inquest previously described.<sup>37</sup>

At this time there were three methods of accusation. The principle of private vengeance was continued through the private accusation known as an *appeal*. Then there was the accusation by the countryside as instituted by the Assize of Clarendon which was known as an *indictment*. This proceeding later evolved into the grand jury. Finally, there was the accusation set in motion by the king who would "inform" his court of some fact which had legal consequences and ask them to act. This type of accusation became known as an *information* and later these were filed by the Master of the Crown and the Attorney General.<sup>38</sup> The trial of these accusations was held by compurgation, ordeal, or battle, the latter being introduced by the Normans. Trial by battle could only be used against a private accuser and could not be used in the case of indictment or information which were tried by compurgation or ordeal.

Compurgation and ordeal, as on the continent, fell into disfavor and finally were done away with. Compurgation disappeared because it was inconsistent with the inquest where 12 men swore under oath that the accused was guilty. Also, cities, towns and England itself were

<sup>35</sup> Plucknett, op. cit. supra note 29, p. 427; Holdsworth, op. cit. supra note 32, Vol. I, pp. 299-311, Vol. IX, p. 130; Pollock & Maitland, op. cit. supra note 30, Vol. I, pp. 39, 40; Stubbs, op. cit. supra note 29, Vol. I, p. 653; Stephens, *ibid.*, at Vol. I, pp. 70-74; Pike, op. cit. supra note 29, Vol. I, pp. 53-56.

<sup>36</sup> Stephens, *ibid.*, at Vol. I, p. 75; Pike, *ibid.*, at Vol. I, pp. 106-109.

<sup>37</sup> Holdsworth, op. cit. supra note 32, Vol. I, pp. 312-316; Stephens, *ibid.*, at Vol. I, pp. 185, 254; Pike, *ibid.*, at Vol. I, pp. 119-123.

<sup>38</sup> Holdsworth, *ibid.*, at Vol. IX, p. 237; Pollock & Maitland, op. cit. supra note 30, Vol. II, p. 662; Stephens, *ibid.*, at Vol. I, pp. 244, 294.

becoming too complex for so intimate a proof as compurgation.<sup>39</sup> The Church, dissatisfied with the barbarism of the ordeals, had abolished them in 1215. This led to the formal abolition of ordeals in England in 1219.<sup>40</sup> Thus, England was a state with an accusatorial system which had no method for trying a man when he was accused by indictment or information. Trial by battle, the only traditional method of trial left, could only be used against a private accuser. At this point England was faced with the same problem that France solved by adopting the inquisitional procedure of the Church and Roman law. England did not adopt this inquisitional procedure but instead introduced an entirely new method of trial into criminal procedure, that is trial by jury. It has been suggested that England could not adopt the inquisitional system of France because England was not as centralized as France and did not have the proper administrative officials, such as clerks to carry out this type of trial. It may also be that England was too far removed from the continent to become familiar enough with the inquisitional method so as to model any procedural system on it. Also, at the time of the Pope's Decree, banning ordeals, King John had just died and his heir, Henry III was just an infant. French armies were fighting on English soil with certain rebellious barons beside them. The government was in serious disorder with grand juries piling up indictments and gaols full of prisoners waiting trial. Therefore, because of the turmoil and uncertainty much was left to the discretion of the individual judge when it came to a method of trial. Though there was probably much experimentation, there soon developed the practice of trying a man by the countryside.<sup>41</sup> How this happened is hard to say.

It has been suggested that trial by jury was adopted from one of the famous land laws of Henry II. When the title of land had been in dispute, men had been drawn from the neighborhood who had knowledge of the relevant facts. They answered under oath which of the two parties was entitled to the land and when one party received 12 oaths in his favor, he won. Perhaps trial judges thought that this would be a good way to settle criminal disputes as well and thus began

<sup>39</sup> Pike, *op. cit.* supra note 29, Vol. I, p. 131.

<sup>40</sup> Holdsworth, *op. cit.* supra note 32, Vol. I, p. 323; Pollock & Maitland, *op. cit.* supra note 30, Vol. I, p. 599; Pike, *ibid.*, at Vol. I, p. 204.

<sup>41</sup> Holdsworth, *ibid.*, at Vol. I, p. 323; Stephens, *op. cit.* supra note 30, Vol. I, p. 254; Pike, *ibid.*, at Vol. I, pp. 206-208.

using the same system to try an accused person.<sup>42</sup> Whether this was the case or whether trial by jury was merely an extension of the indictment by the countryside, the jurors had knowledge of the facts in early criminal cases. They were in a sense witnesses, but more than that, they were a method of proof. Like the traditional, primitive methods of proof, trial by jury was permeated with the religious element.<sup>43</sup>

At first when a man was indicted by the countryside, the judges merely tried him by these same men.<sup>44</sup> This necessarily meant that nearly every indictment was itself a conviction despite the fact that the accused could challenge the jurors and the judge often questioned them as to their information.<sup>45</sup> When a person was privately accused by an *appeal* he could have resort to trial by battle but often did not want to do so. Thus, the practice arose in private accusations of asking a man how he would be tried which gave him a chance to answer, "by my country."<sup>46</sup> Eventually, due to obvious injustice, the presenting jury was separated from the trying jury.<sup>47</sup> However since the trying jury was originally a body of witnesses, the jurors were still allowed to decide a case upon their own knowledge. This procedure was later done away with and the members of a trying jury were not allowed to decide a case on their own knowledge, but had to rely on the evidence as presented in court.<sup>48</sup> The accused was not allowed to introduce witnesses, to have counsel or to give testimony under oath because all this would be unnecessary in a trial which was a method of proof.<sup>49</sup>

After the abolition of the ordeal, a very strange thing occurred in the criminal procedure of England. A principle had been established that no man should be convicted of a capital crime by mere testi-

<sup>42</sup> Devlin, *Trial by Jury*, pp. 7-10, (The Hamlyn Lecture Series, London, 1956).

<sup>43</sup> Holdsworth, *op. cit. supra* note 32, Vol. I, p. 317, Vol. III, p. 612.

<sup>44</sup> Holdsworth, *ibid.*, at Vol. I, p. 322; Pollock & Maitland, *op. cit. supra* note 30, Vol. II, pp. 647, 648; Pike, *op. cit. supra* note 29, Vol. I, pp. 205-208.

<sup>45</sup> Holdsworth, *ibid.*, at Vol. I, p. 324; Pollock & Maitland, *ibid.*, at Vol. II, p. 649; Stephens, *op. cit. supra* note 30, Vol. I, p. 301; Pike, *ibid.*, at Vol. I, p. 206.

<sup>46</sup> This phrase is still heard today. Devlin, *op. cit. supra* note 42, p. 10; Pike, *ibid.*, at Vol. I, p. 207.

<sup>47</sup> Pollock & Maitland, *op. cit. supra* note 30, Vol. II, pp. 648, 649; Pike, *ibid.*, at Vol. I, pp. 207, 208.

<sup>48</sup> Holdsworth, *op. cit. supra* note 32, Vol. I, pp. 332-337; Pike, *ibid.*, at Vol. I, p. 208.

<sup>49</sup> Holdsworth, *ibid.*, at Vol. I, pp. 325, 326, Vol. IX, p. 195.

mony.<sup>50</sup> What would happen then, if a man refused to be tried by jury, the only method of trial left? In view of the above principle this created a grave problem since it would be too great a break in tradition, "to sentence a man who had been allowed no chance of proving his innocence by any of the world-old sacral processes."<sup>51</sup> Therefore, beginning in 1219, prisoners were sent to the "peine fort et dure," where they were at first confined and starved and later tortured until they would plead.<sup>52</sup>

#### SELF-INCRIMINATION

When William conquered England, he found that bishops sat as judges in the popular courts while in France they merely sat in ecclesiastical courts with jurisdiction over ecclesiastical matters. Therefore, he enacted that bishops should only have jurisdiction over ecclesiastical matters as in France, which resulted in a system of double judicature.<sup>53</sup> His purpose was no doubt to strengthen his government and enlarge the royal jurisdiction. As time passed, these two forces came more and more into conflict over their respective jurisdictions.<sup>54</sup>

Earlier it was seen that Pope Innocent III in 1215 instituted a manner of investigation whereby the accused and others were examined under oath when circumstances warranted. This inquisitorial system bolstered by the discovery that Roman law had also allowed such investigation was in widespread use in continental ecclesiastical procedure. When Henry III married a French woman, this inquisitorial system was introduced into England's ecclesiastical law by two French priests who came to England. The popular courts, it is noted, always began with some manner of accusation whether it was appeal, presentment or information. This new method, "the inquisitio," began "ex officio mero" without any manner of accusation and often without the suspicion necessary for its use as required by the decretals of Pope Innocent III.

<sup>50</sup> Holdsworth, *ibid.*, at Vol. IX, p. 179.

<sup>51</sup> Pollock & Maitland, *op. cit.* supra note 30, Vol. II, p. 650.

<sup>52</sup> There was no forfeiture to the Crown if a man did not plead which may have been an incentive to many prisoners. "Peine fort et dure" was part of the law until 1772. Holdsworth, *op. cit.* supra note 32, Vol. I, pp. 326, 327; Stephens, *op. cit.* supra note 30, Vol. I, pp. 297-301; Pike, *op. cit.* supra note 29, Vol. I, pp. 210, 211.

<sup>53</sup> Pollock & Maitland, *op. cit.* supra note 30, Vol. I, pp. 88, 449, 450.

<sup>54</sup> Wigmore, *Evidence*, Vol. VIII, pp. 278-293 (3rd ed. Bost., 1940); Stephens, *Practice of Interrogating Persons Accused of Crime. Papers Read Before the Juridical Society*, pp. 460, 461 (1857).

This innovation in procedure met with some disapproval early but since the great controversy centered around jurisdiction of Church and state, it was for some time neglected. The controversy arose again when Henry VIII designated himself head of the Church of England. The court of the Star Chamber was established, with broad sweeping jurisdiction following *ecclesiastical* rules of procedure. This meant that the Star Chamber could call in a man without first accusing him and question him at length. This is the same procedure which the Church had used to check the veracity of rumors centuries before in a logical, rational way. A reaction grew up in England against questioning a man under oath without having some manner of accusation first. The fact that a man could be called in arbitrarily by the government and questioned and later even tortured did not sit well with the English people. Traditionally, no man could be questioned until he had been accused and it was this questioning without an accusation that irked the people. They did not mind being interrogated because that was normal procedure in the common law and ecclesiastical courts. Historically, the accused had always been bound to exculpate himself. In the earlier days of direct vengeance, he had to defend himself. By ordeals he had to prove his innocence or guilt by submitting to them himself. Compurgation involved his own oath and testimony of innocence. Surely, the burden was always directly on the accused, a burden which he did not protest. Indeed, many cases throughout early history show that the accused was interrogated in the common law courts without protest. Among these cases, the famous *Throckmorton* case in 1554,<sup>55</sup> the *Duke of Norfolk's* case in 1571<sup>56</sup> and *Udall's* case in 1590<sup>57</sup> are remarkable in that all were men of intelligence and learning and yet, made no objection to being interrogated in the common law courts. Therefore, it is readily seen that the interrogation of prisoners was practised up until the end of the 17th century in common law courts.<sup>58</sup> However, in the ecclesiastical courts and those following ecclesiastical procedure, the problem of jurisdiction and the "ex officio" oath were becoming more pronounced so that

<sup>55</sup> Discussed in: Stephens, *ibid.*, at p. 461; Stephens, *op. cit.* supra note 30, Vol. I, pp. 325-329.

<sup>56</sup> Discussed in Stephens, *ibid.*, at Vol. I, pp. 330, 331.

<sup>57</sup> Discussed in Stephens, *op. cit.* supra note 54, pp. 462, 463. This case was decided in the same year as *Cullier v. Cullier* which raises the maxim, "nemo tenetur prodere seipsum."

<sup>58</sup> Porter, *Current Legal Problems*, Vol. 2, p. 18 (1949).

decisions starting with *Cullier v. Cullier*<sup>59</sup> began to appear invoking the maxims, "nemo tenetur prodere" or "accusare seipsum" or "nemo debet esse testis in propriis causa." The objection was that the ecclesiastical courts had put the oath improperly to the accused because of lack of jurisdiction and the lack of a formal accusation.

The Star Chamber, using ecclesiastical procedure and with broad jurisdiction, began using torture and other harsh methods<sup>60</sup> which arousing public criticism culminated in the famous case of *Colonel Tilburne*<sup>61</sup> in 1637. The reaction again seemed to be against the "ex officio" oath, torture and the jurisdiction of ecclesiastical courts. The result was the abolition of the Star Chamber and the abolition of the use of the "ex officio" oath in ecclesiastical courts in matters penal. However, though Tilburne's objection was to the lack of a formal accusation, this distinction came to be ignored and it was claimed flatly that no man is bound to incriminate himself on any charge, no matter how properly instituted or in any court. This claim was conceded by the common law courts and by the end of Charles II's reign under the restoration there was no doubt as to this principle in any court.

#### INCOMPETENCY OF THE ACCUSED

After the Restoration, the pendulum swung the other way. The accused was not allowed to testify even if he wanted to. This rule first appeared in civil cases during the 1500's, making parties to a case incompetent. It seemed to be an outgrowth of the old trial of compurgation which later became known as *wager of law*, being used mainly in detinue and debt. In *wager of law* a man's oath was needed but in trial by jury, a distinctly different trial, there was no need for anything so solemn as a party's oath. Trial by jury was one method of proof with all the religious implications while the testimony of the accused under oath was another. Therefore, in the evolution of jury trial when witnesses began being introduced and sworn under oath, the party to a case was incapable of becoming a witness because he was being tried by a jury and to place him under oath would be to invoke *another method of proof* which would be contradictory and unnecessary.<sup>62</sup>

<sup>59</sup> Discussed in: Wigmore, op. cit. supra note 54, Vol. VIII, p. 287; Stephens, op. cit. supra note 54, pp. 457, 467.

<sup>60</sup> Williams, Proof of Guilt, pp. 37-39 (Hamlyn Lecture Series, London, 1957).

<sup>61</sup> Discussed in: Wigmore, op. cit. supra note 54, Vol. VIII, pp. 291, 292; Stephens, op. cit. supra note 30, Vol. I, pp. 343-345.

<sup>62</sup> Porter, op. cit. supra note 58, p. 18; Wigmore, *ibid.*, at Vol. II, p. 681.



However, the accused had always been allowed to *plead* in person because he was not allowed counsel in treason cases until 1695 and in felonies until 1836. Therefore, the accused was forced to defend himself and the custom arose of allowing him to tell his story to the jury in the form of an unsworn statement. The right of the accused to make an unsworn statement, which still exists in England today, had nothing to do with the incompetency of the accused since he was not sworn, was not considered a witness and, though there is disagreement, did not *give evidence* in theory of law.<sup>63</sup>

At early common law, the accused was not allowed witnesses since the jurors had knowledge of their own. However, as witnesses began being used in civil cases, the accused was allowed witnesses who testified without taking an oath. Then he was given compulsory process for them and finally by statutes in 1695 and 1701, the accused was allowed to have his witnesses sworn in cases of treason and felony. The result of course placed the accused in the same position as a party in a civil case and thus the civil rule was adopted whereby the accused was disqualified to testify.<sup>64</sup>

At this time the historical distinction between trial by jury and trial by oath seems largely to have been forgotten. Courts began stating that the reason parties were disqualified from testifying was because of their interest in the case. Total exclusion from the stand was a proper safeguard against a false decision whenever the persons offered were of a class especially likely to speak falsely. Since the accused as an interested party was likely to speak falsely, he was totally excluded from testifying. As was stated:

The law will not receive the evidence of any person, even under the sanction of an oath, who has an interest in giving the proposed evidence, and consequently whose interest conflicts with his duty. This rule of exclusion, considered in its principle, requires little explanation. It is founded on the known infirmities of human nature, which is too weak to be generally restrained by religious or oral obligations, when tempted and solicited in a contrary direction by temporal interests.<sup>65</sup>

It was not until Bentham's time that the policy of this rule was questioned. He pointed out that if the discovery of truth be, as it ought to be, considered the one object at which all courts of law should steadily aim, the exclusion of the evidence of the very persons

<sup>63</sup> Porter, *ibid.*, at p. 18; Wigmore, *ibid.*, at Vol. II, p. 684; Pike, *op. cit. supra* note 29, Vol. II, p. 206.

<sup>64</sup> Holdsworth, *op. cit. supra* note 32, Vol. IX, p. 196.

<sup>65</sup> Starkie, *Evidence*, p. 83 (Phila., 1869).

who could tell most about the transaction under investigation was certainly not conducive to this end.<sup>66</sup> He argued that the danger of parties testifying falsely was not a certainty and that the danger of deception was small because the judge and jury were aware of the parties' interest and because the party would have to be subjected to that great test of truth, the cross-examination. He colored his arguments with various examples of injustice<sup>67</sup> resulting from a party's incompetency and with brilliant logic<sup>68</sup> exposed the fallacies in reasoning which had made witnesses and parties to a suit incompetent. Bentham's theory that interest should affect credibility and not competency spread to criminal procedure and began a movement which caused the passage of some 28 statutes in and after 1872 enabling the accused to testify.<sup>69</sup> The culmination of this movement was the passage of the Criminal Evidence Act, 1898 which will be discussed.

#### CONFESSIONS

During the early English history it is clear that there was no doctrine of excluding confessions.<sup>70</sup> Confessions were thought of as a plea of guilty and therefore dispensed with the necessity of evidence

<sup>66</sup> "Be the dispute what it may, see everything that is to be seen; hear everybody who is likely to know anything about the matter: hear everybody, but most attentively of all, and first of all, those who are likely to know most about it—the parties." *Rationale of Judicial Evidence*. Quoted in Wigmore, *op. cit.* supra note 54, Vol. II, p. 694.

<sup>67</sup> For example in an action on a tailor's bill, the tailor could not give evidence that he had supplied the garments; but if he could find a witness who would swear that he chanced to be present when the defendant obligingly walked into the plaintiff's shop and said to him, "Oh! Mr. Tailor, I had these breeches from you last winter, and I owe you £5 for them," this was good evidence of "an admission" by the defendant of the goods having been sold and delivered to him, and also of an "account stated" between the parties, and the defendant in his turn could not contradict by his own denial evidence, however false it may be, which was opposed to his own interest. *The Law Times*, Vol. 99, p. 104.

<sup>68</sup> "Every Defendant is 'per etat,' by his station in the cause, a liar: a man who, if suffered to speak, would be sure to speak false, and equally sure to be believed. Every defendant is a liar. But every human being may, at the pleasure of every other, be converted into a liar, and, in that character, has capacity of giving admissible testimony annihilated." *Rationale of Judicial Evidence*. Quoted in Wigmore, *op. cit.* supra note 54, Vol. II, p. 694.

<sup>69</sup> These statutes are listed in Best, *Evidence*, pp. 535, 536 (Bost. 1908).

<sup>70</sup> A confession is a species of admissions defined as an acknowledgment in express words, by the accused in a criminal case, of the truth of the guilty fact charged or of some essential part of it. Wigmore, *op. cit.* supra note 54, Vol. III, p. 238. Confessions can be divided into two classes, namely, judicial and extrajudicial. Judicial confessions are made before a magistrate, or in court, in the due course of legal proceedings. In other words, it is a plea of guilty. Extra-judicial confessions are made by the party elsewhere than before a magistrate or in court. Taylor, *Evidence*, Vol. I, p. 545; Roscoe, *Evidence*, p. 38, (London, 1956).

or a trial and were followed by immediate conviction.<sup>71</sup> After the restoration of 1660, as criminal procedure took form and rules of evidence began to be laid down, it was noted by the courts that some extra-judicial confessions were untrustworthy as an affirmation of guilt and so they began to exclude some from evidence. In 1783, the exclusionary rule was laid down as follows:

Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not entitled to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore, it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.<sup>72</sup>

By the beginning of the 19th century, the whole attitude of the judges had changed. There was a general suspicion of all confessions, a prejudice against them as such, and an inclination to repudiate them upon the slightest pretext. There are several reasons for this policy on the part of the 19th century judges:

1. Most offenders of the time were of the lower classes and thus subordinate and submissive in a half-stupid manner to those in authority. False confessions were easy to procure from these people;
2. There was no right of appeal so judges had to consult one another over difficult and doubtful problems. Since most judges did not want to trouble fellow associates or cause delay, they each tried to eliminate doubtful evidence. Confessions were often excluded because under certain circumstances, they were doubtful evidence;
3. The accused was not allowed to testify or to be represented by counsel. It seemed quite unfair to the judges to hold what a man said under doubtful circumstances against him and then refuse to allow him to speak out in open court.<sup>73</sup>

When the courts did exclude confessions they usually gave as the fundamental and underlying principle for the exclusion the fact that under certain conditions a confession was testimonially untrustworthy.<sup>74</sup> Thus, though it was generally accepted that all untrustworthy

<sup>71</sup> The confession was technically a plea of guilty which the accused pleaded before the court and which the court could refuse to record if it felt the plea stemmed from fear, menace or duress. Thus, there was no question as to its admissibility as evidence and therefore it was thought of as a "conviction." Wigmore, *op. cit.* supra note 54, Vol. III, pp. 232-236.

<sup>72</sup> *K. v. Warickshall*, 1 Leach Cr. C. 263, 168 Eng. Rep. 234 (1783).

<sup>73</sup> Wigmore, *op. cit.* supra note 54, Vol. III, pp. 351-356.

<sup>74</sup> *K. v. Warickshall*, 1 Leach Cr.C. 263, 168 Eng. Rep. 234 (1783); *Scott's Case*, 1 D. & B. 58 (1856); *R. v. Mansfield*, 14 Cox. Cr. Cas. 639 (1881).

confessions should be excluded, the courts were faced with the problem of deciding which confessions were untrustworthy.<sup>75</sup> Since single judges were sitting in different circuits and even in different generations, it was quite natural that different tests would be employed by different judges in deciding which confessions were untrustworthy. One test put as the reason for distrusting a confession was the fact that a person is placed in such a situation that an untrue confession of guilt irrespective of its truth or falsity has become the more desirable of two alternatives between which the person is obliged to choose.<sup>76</sup> Another test used is, was the confession induced by a threat or promise, by a fear or hope.<sup>77</sup> Finally a test was employed whereby it was asked if the confession was "voluntary." The term "voluntary" was used as a test for trustworthiness and not in connection with compulsory self-incrimination. It was considered supplementary to, and usually mentioned in reference to promises or threats.<sup>78</sup>

Regardless of the test employed to determine if a confession was untrustworthy, the person who was attempting to obtain the confession, had to have the power, that is, the authority, to induce the confession. Then, considering the inducement itself, it had to be sufficient

<sup>75</sup> Since confessions were excluded because they were untrustworthy, the courts held that confessions were not to be excluded because of any breach of confidence or good faith. A confession was not excluded because of any illegality in the method of obtaining it. From the historical development of the privilege against self-incrimination, it is seen that the exclusion of confessions and the doctrine of self-incrimination are two distinct principles. The privilege against self-incrimination protects the accused from making any disclosure which is compulsory regardless of the truth or falsity of the disclosure. Where this privilege is violated, the principle behind it prevents the use of such evidence without resort to the principles used for the exclusion of confessions. The confession rule excludes confessions which are untrustworthy thus aiming to exclude false confessions. The privilege rule only covers statements made in legal proceedings. The confession rule excludes statements made out of court as well. The confession rule goes beyond the privilege rule and can exclude statements made without compulsion. If the privilege has been waived or not claimed, the confession rule can still act to exclude. The privilege rule applies to witnesses in all proceedings. The confession rule is concerned only with the party defendants in criminal cases.

<sup>76</sup> "The object of the rule relating to the exclusion of confessions is to exclude all confessions which may have been procured by the prisoner being led to suppose that it will be better for him to admit himself to be guilty of an offense which he really never committed." *R. v. Court*, 7 C. & P. 486 (1836).

<sup>77</sup> "If hope has been excited or threats or intimidation held out, it shall not be received." *R. v. Gibney*, *Jebb C. C.* 15 (1822).

<sup>78</sup> "A simple test . . . Is it proved affirmatively that the confession was free and voluntary; that is, was it preceded by any inducement to make a statement held out by a person in authority." *R. v. Thompson*, [1893] 2 Q.B. 17. The use of the word "voluntary" has caused some confusion of the confession rule with the privilege of self-incrimination. See *Bram v. United States* 168 U.S. 532 (1897).

to bring about a false confession. A threat of physical violence was the clearest case of an inducement that would exclude a confession. A person threatened with a whip, gallows or rack will prefer to confess, even falsely, to avoid the disagreeable consequences. A promise of pardon has been held sufficient to induce a false confession so that the confession was excluded.<sup>79</sup> Promises of favorable legal action such as cessation of prosecution or release from arrest have also been held to be sufficient inducements to render a confession untrustworthy.<sup>80</sup> Since confessions are not excluded on grounds of public faith or of private pledge of secrecy,<sup>81</sup> it follows that the use of a trick or fraud does not exclude a confession induced by the means of it unless the trick or fraud would act to produce a false confession.<sup>82</sup>

In considering the various inducements sufficient to bring about a false confession, the question arose as to whether the mere fact of arrest alone, or presence before a magistrate, or examination under oath was in itself a sufficient inducement to render a confession untrustworthy. During the 19th century, due to the reaction against the reception of confessions into evidence, many judges excluded confessions on these grounds alone without any threats, promises or assurances. These exclusions were based on the principle that the confession was not "voluntary." However, in taking the term "voluntary," they did not consider it with reference to threats or promises, but made it into a final and absolute test. In other words, was the situation such that the person had to speak, felt obliged to speak, or was it a matter of pure choice with him to speak or not? There was no concern for the truth or falsity of the confession but only, was it "voluntary"? Thus, the principle underlying the exclusion of confessions, namely,

<sup>79</sup> Inducements involving lighter punishments, milder treatment or reward of money have not been held sufficient inducements to make a confession untrustworthy and hence excludable. Wigmore, *op. cit.* *supra* note 54 at Vol. III, pp. 271-274.

<sup>80</sup> *R. v. Simpson*, 1 Mood. 410 (1834); *Boughton's Case*, 6 Cr. App. 8 (1910). Various assurances such as, "What you say will be used for you," or "used against you," were at one time grounds for exclusion in England. These rulings were overturned by *R. v. Baldry*, 2 Den. C. C. 430 (1852). "You had better confess" has also been held to be a sufficient inducement to vitiate a confession. *R. v. Coley*, 10 Cox Cr. Cas. 536 (1868). The influence of a religious or moral nature has also been held to be sufficient inducement to render a confession untrustworthy. *R. v. Radford*, 1 Mood. 197 (1823).

<sup>81</sup> "It is a mistaken notion that the evidence of confessions and facts which have been obtained from prisoners by promises or threats is to be rejected from a regard to public faith; no such rule ever prevailed. The idea is novel in theory, and would be as dangerous in practice as it is repugnant to the general principles of criminal law." *K. v. Warickshall*, 1 Leach Cr. C. 263, 168 Eng. Rep. 234 (1783).

<sup>82</sup> *R. v. Derrington*, 2 C. & P. 418 (1826).

that the confession is untrustworthy because it may be false was ignored and involuntary confessions were excluded even though they might have been true. This in effect looks like an extension of the privilege against self-incrimination which had become confused with the entirely separate doctrine of exclusion of confessions.<sup>83</sup> In the latter part of the 19th century this test was somewhat altered, namely, was the confession obtained by asking questions of a person while in custody?<sup>84</sup> The test of "voluntariness" was also extended to another form which argued that when persons are suspected wrongly of a crime, officially charged and questioned, especially when circumstances are strongly inculpatory, they are apt to make the first explanation that occurs to them and thus try to assert their innocence by inventing false stories.<sup>85</sup> This test aims to exclude statements of innocence and not confessions as such and thus cannot be used to exclude confessions. The application of these various tests at different stages of criminal procedure will be considered subsequently.

#### AMERICAN HISTORICAL BACKGROUND

##### THE PRIVILEGE AGAINST SELF-INCRIMINATION

The early colonists had the benefit of the great 17th century English struggle for the privilege against self-incrimination. They, as

<sup>83</sup> *R. v. Baldry*, 2 Den. C. C. 441 (1852); *R. v. Johnston*, 15 Fr. C. L. 60 (1864). This test has been criticized because it overlooks the fundamental theory behind the exclusion of confessions, that is, the risk that they are untrue. It has also been criticized because the privilege of self-incrimination allows a person to testify if he chooses and such testimony will be received. Exclusion by the mere fact of arrest or interrogation contradicts the rule. It is finally argued that there is no compulsion in mere custody or examination which makes a statement involuntary and hence excludable.

<sup>84</sup> "When a prisoner is in custody, the police have no right to ask him questions. Reading a statement over, and then saying to him, 'What have you to say?' is cross-examining the prisoner, and therefore I shut it out. A prisoner's mouth is closed after he is once given in charge, and he ought not to be asked anything." *R. v. Gavin*, 15 Cox. Cr. Cas. 656 (1885); *R. v. Johnston*, 15 Fr. C.L. 66 (1864).

<sup>85</sup> "The danger to be guarded against is not, in the far greatest number of cases, that an innocent man will fabricate a statement of his own guilt, although instances of this have occurred, too well attested to be doubted. The danger is that an innocent person, suddenly arrested, and questioned by one having the power to detain or set free, will (when subjected to interrogatories, which *may* be administered in the mildest or *may* be administered in the harshest way, and to persons of the strongest and boldest or of the most feeble and nervous natures) make statements not consistent with the truth, in order to escape from the pressure of the moment." *R. v. Johnston*, 15 Fr. C.L. 60, 121 (1864). This test was repudiated by the English courts in 1856 though championed by the Irish judges above. Its true origin is the American case, *Hendrickson v. People*, 10 N.Y. 13, 33 (1854) by Judge Selden. The rule is therefore known as "Selden's principle of mental agitation."

British subjects, could claim flatly that no man is bound to incriminate himself.<sup>86</sup> Since the privilege was long recognized in the colonies, its denial was not one of the abuses which led to the American Revolution. It was not mentioned in the Declaration of Independence which lists twenty-nine grievances against the British Crown. Neither the Declaration of Rights by the Stamp Act Congress in 1765 nor that of the Continental Congress in 1776 included the privilege in enumerating fundamental rights. However, before 1789, the privilege had been inserted in the constitutions or bills of right of seven American states.<sup>87</sup> Nine states, enough to put the United States Constitution in operation, ratified it without a suggestion of incorporating this privilege.<sup>88</sup> In 1789, whatever the reason, the privilege came to be included in the Bill of Rights and is known more popularly today as "the Fifth Amendment."<sup>89</sup> Some people argue that the reason for the American insistence to have this privilege incorporated in the Bill of Rights was the French dissatisfaction and agitation with the inquisitorial feature of the Ordonnance of 1670.<sup>90</sup> It is also suggested that

[t]he real reason for the American insistence that the privilege against self-incrimination be made a constitutional privilege may possibly be traced to the proceedings of the prerogative courts of Governor and Council, which constituted the Supreme colonial courts, and the proceedings instituted to enforce the laws of trade in the colonies.<sup>91</sup>

Today, the Federal Constitution and the constitutions of the various states recognize and sanction the privilege against self-incrimination.<sup>92</sup> The protection under all these clauses extends to all manner of proceedings in which testimony is to be taken, whether litigious or not,

<sup>86</sup> Massachusetts recognized and employed the ecclesiastical rule by which the inquisitorial oath was allowed until 1685 when they adopted the privilege against self-incrimination. *Twining v. New Jersey*, 211 U.S. 78, 108 (1908).

<sup>87</sup> The seven states were: Virginia (June 1776); Pennsylvania (Sept. 1776); Maryland (Nov. 1776); North Carolina (Dec. 1776); Vermont (July 1777); Massachusetts (Mar. 1780); and New Hampshire (1784).

<sup>88</sup> *Twining v. New Jersey*, 211 U.S. 78, 110 (1908). The other four states, Virginia, New York, North Carolina and Rhode Island included the privilege among long lists of suggested privileges to be incorporated. It is interesting to note that New York and Rhode Island had not incorporated the privilege into their state constitutions and did not do so for many years.

<sup>89</sup> The privilege in England was a matter of judicial decision only. It was not mentioned in the Magna Carta, the English Bill of Rights or the Petition of Right.

<sup>90</sup> Wigmore, *op. cit.* supra note 54, Vol. VIII, p. 302.

<sup>91</sup> Wigmore, *ibid.*, at Vol. VIII, p. 304, quoting Mr. R. Carter Pittman.

<sup>92</sup> Iowa and New Jersey are the only states which do not include the privilege in their Constitutions.

and whether "ex parte" or otherwise. It applies in all kinds of courts, in all methods of interrogation before a court, in investigations by a grand jury, in investigations by a legislature or a body having legislative functions and in investigations by administrative officials. The Fifth Amendment of the Federal Constitution only applies in federal proceedings and cannot be invoked in state proceedings. The Fourteenth Amendment preserving the "privileges and immunities of citizens of the United States" against impairment by state law does not include the privilege against self-incrimination. The guarantee of "due process of law" in the Fourteenth Amendment does not include the privilege. Therefore, in state proceedings the privilege against self-incrimination is a matter of the state constitution or state policy.<sup>93</sup>

The privilege is merely an option of refusal, not a prohibition of inquiry and thus it follows that the privilege *must be claimed*. In the case of an ordinary witness, the question is usually put to him and then he can exercise his privilege. In the case of the accused, the privilege exempts him from all answers whatsoever because no relevant fact could be inquired about that would not tend to criminate him. Thus, the prosecution does not have the right to call the accused to be sworn in a trial.<sup>94</sup> It is seen then, that the privilege against self-incrimination includes two distinct principles. First, a witness can claim the privilege by refusing to answer a question though he may be called and must take the stand. This is not the same rule as the historical principle under discussion. Historically, it was a privilege of the accused. He not only did not have to answer any questions but there was no right to ask them. Today, the accused still has this right because he cannot be called to the stand by the prosecution.<sup>95</sup>

The privilege may be waived. This waiver may be by contract for

<sup>93</sup> *Twining v. New Jersey*, 211 U.S. 78 (1908).

<sup>94</sup> Wigmore argues that the prosecution should be allowed to call the accused to be sworn because it is otherwise not known beforehand whether the accused would exercise his privilege. The present rule may be due to several factors:

- (1) Since the accused was not allowed to testify until the statutory changes between 1860 and 1900, to call him would have been useless and thus, the negative practice becomes fixed;
- (2) If the accused does testify today, the prosecution upon cross-examination can put the same questions to him;
- (3) The statutes usually state that the accused is a qualified witness "at his own request" but "not otherwise."

Wigmore, *op. cit. supra* note 54, Vol. VIII, pp. 392, 393.

<sup>95</sup> Williams, *op. cit. supra* note 60, pp. 35, 36.



[U]nless the contract is one which by its circumstances has come within the doctrine of duress or oppression, and is thus voidable on general principles of contract, there is no reason in its present aspect why it should not be binding. This has been the doctrine since the origin of the privilege.<sup>96</sup>

The privilege may also be waived by volunteering testimony from the stand. In the case of the accused, the waiver occurs if he voluntarily takes the stand because, as seen, his privilege protects him from being asked a single question. A witness is compelled to take the stand in the first instance and his opportunity for choice does not come until the incriminating question is asked. The accused has his choice from the outset. From this basic proposition there follow various solutions as to the extent of waiver in the event the accused does take the stand.

#### INCOMPETENCY OF THE ACCUSED

The early American colonies also inherited the English rule in regard to the testimony of parties in a civil case and the accused in a criminal case. Both were disqualified because of interest. Since the policy of this rule was not questioned until Bentham's time, it was not until 1864 that Maine, the first state to do so, declared the accused competent to testify by statute. Massachusetts followed suit in 1866, then Connecticut in 1867, New York and New Hampshire in 1869 and New Jersey in 1871. England did not make the accused competent until 1898. Today, in the federal courts and in all state courts except Georgia, the accused is a competent witness. Progress was generally slower in the Southern states and was often accompanied by a proviso that the accused should testify, if at all, *first* in the order of the witnesses on his own side.

Since competency was first granted to the accused in America, the consequences of such legislation were discussed, argued and weighed at an earlier period than in England which did not grant such competency until 1898. Bentham's reasoning which clearly demonstrated that interest should not affect competency but only credibility was accepted by the majority of jurists. Their arguments went beyond this. For example, in one case it was stated:

[I]n the great body of cases, no wise practitioner would permit his client, whether he believed him guilty or innocent, to testify when upon trial on a criminal charge. The very fact that he testifies as if with a halter about his neck, that he is under such inducement to make a fair story for himself, his character and his liberty if not his fortune and his life being at stake, is enough to usually deprive his testimony of all weight in his favour, whether it be true

<sup>96</sup> Wigmore, *op. cit.* supra note 54, Vol. VIII, p. 435.

or false. This is the case even when his manner upon the stand is unexceptional, while his critical condition often creates such apprehension and excitement that his manner is open to great criticism, and if he does make a mis-step after voluntarily assuming the responsibility of testifying, it will naturally be construed strongly against him. In short, his testimony is far more likely to injure him seriously than to help him a little. It is true that a clear intellect and perfect self-possession may enable an unscrupulous rogue to run the gauntlet of a cross-examination and make something out of this privilege; and the same qualities will be still more likely to help an innocent man to some advantage from it; but the true application of the statute [qualifying him] is only to those rare cases, when a word from the prisoner, and him only, will manifestly dispose of what otherwise seems conclusive against him.<sup>97</sup>

In another case it was argued:

[T]he policy of such a statute has been considerably discussed by law writers and others, and to our minds, the strongest objection that has been urged against it, is, that it places a party charged with crime in an embarrassing position; that, even when innocent, a party upon trial upon a charge for some grave offence may not be in a fit state of mind to testify advantageously to the truth even, and yet if he should decline to go upon the stand as a witness, the jury would, from this fact, inevitably draw an inference unfavorable to him, and thus he would be compelled, against the humane spirit of the common law, to furnish evidence against himself, negatively at least, by his silence, or take the risk, under the excitement incident to his position, of doing worse, by going upon the stand and giving positive testimony.<sup>98</sup>

In pointing out that the accused can do himself no good by taking the stand it has been stated:

[W]here evidence other than the prisoner's, is called for the defence, it will be found that it is either positive or explanatory. If the jury do not believe this testimony, it is almost unnecessary to argue that they will not believe the story of the prisoner. His statements cannot do more as a rule than corroborate the witnesses already called on his behalf, and if these witnesses are not believed,

<sup>97</sup> State v. Cameron, 40 Utah 555, 565 (1868). "He will be examined under the embarrassments incident to his position, depriving him of his self-possession, and necessarily greatly interfering with his capacity to do himself and the truth justice, if he is really desirous to speak the truth. These embarrassments will more seriously affect the innocent than the guilty and hardened in crime." *Ruloff v. The People*, 45 N.Y. 213, 221, 222 (1871). In presenting these and other arguments E. F. B. Johnston put forth this general rule: "*never put the accused in the box.*" [1931] 4 D.L.R. 1, 3.

<sup>98</sup> *People v. Tyler*, 36 Cal. 522, 528 (1869). "They in reality force him to take the stand to protect himself from the inference of guilt which is almost sure to be drawn against him if he fail to do so, and the case call for an explanation on his part. He may be never so innocent, yet his omission to testify must always be at the risk of condemnation on the presumption of guilt founded on his silence when the law gives him an opportunity to speak. . . . It may be asked, in reply, whether it is in the power of courts or legislatures to prevent the accused's failure to testify from prejudicing him in the minds of the jury. It is a fact in the case which the jury have derived from the infallible evidence of their own senses, and which must needs force itself on their minds." Wm. A. Maury in 14 Am. L. Rev. 753, 763 (1880).

very little, if any, weight will be given to the corroboration. If they do believe his witnesses, there is an end to the case.<sup>99</sup>

From these arguments it can be seen that the great worry was not that the accused would perjure himself and be believed by the court and jury because of his interest in the case, but because the result of making him competent would be unfair to him. These arguments may be summarized as follows: (1) The testimony of the accused is of little value to him since his credibility is affected by his position. (2) The option given to the accused to remain silent or give evidence is an illusory election and not equal. (3) If the accused does take the stand, he waives his privilege against self-incrimination and can be cross-examined even as to prior unproved crimes in some states and to varying degrees in others.<sup>100</sup> (4) If the accused is innocent and takes the stand, he can easily give a bad impression under clever cross-examination and so lose his case.<sup>101</sup> (5) If the accused exercises his privilege against self-incrimination and refuses to testify, an inference will naturally arise in the jury's mind which legislation or judge cannot erase. If the prosecutor or judge is allowed to comment on such fact, the situation is immeasurably worse. (6) It changes the presumption of innocence to a presumption of guilt.<sup>102</sup> (7) It violates the privilege against self-incrimination.<sup>103</sup>

The result of this opposition acted to slow down the general accept-

<sup>99</sup> E. F. B. Johnston in [1931] 4 D.L.R. 1, 5.

<sup>100</sup> "[A]nd, if he does, what becomes of the constitutional provision that no man shall be compelled to furnish evidence against himself? Can he decline to answer on the ground that his answer might tend to criminate him? Has he not thrown overboard all his defensive armor? Is he not to be stretched on the rack of cross-examination? Will not all his secrets be wrung out of him by the torture of question after question?" 1 Am. L. Rev. 466 (1866).

<sup>101</sup> Wm. A. Maury points out that Bentham placed great reliance on the Throckmorton case in regard to the testimony of the accused. He then quotes from Mr. Jardine who stated in regard to the Throckmorton case that "a man of less firmness of nerve, though entirely innocent, would, under such circumstances have been utterly unable to defend himself." He also quotes from Mr. Stephen: "None but those who constantly see it can appreciate the gross stupidity of prisoners, or the state of abject helplessness to which terror and the apparatus of courts of justice reduce them." 14 Am. L. Rev. 759, 760 (1880).

<sup>102</sup> This argument is presented in 103 Law Times p. 297 (1897).

<sup>103</sup> This argument is used by Wm. A. Maury in holding all such legislation invalid as being contrary to the privilege against self-incrimination. Also see *Ruloff v. The People*, 45 N.Y. 221, 222 (1871) where it is stated: "The individual is morally coerced, although not actually compelled to be a witness against himself. The Constitution, which protects a party accused of crime from being a witness against himself, will be practically abrogated."

ance of the movement to grant competency to the accused. However, to give the accused a chance to tell his story in exculpation, the practice grew up and was introduced by statute of allowing the accused to tell his story, not under oath and not as a witness, but in the guise of an address or argument on the testimony and the whole case. This practice, similar to English "unsworn statements," was in keeping with Bentham's theories regarding interest and yet avoided the evils of the above arguments. This practice soon disappeared in most jurisdictions so that today the accused may only testify under oath if he so desires.

#### CONFESSIONS

The reasoning of the English courts has influenced the American decisions in the field of confessions to a great degree. The American courts have accepted as the fundamental and underlying principle for the exclusion of confessions, the fact that under certain circumstances, a confession is testimonially untrustworthy.<sup>104</sup> The various English tests for untrustworthiness have been accepted by different American courts at different times. Some courts have employed the test whereby a confession is excluded when a person has been placed in such a situation that an untrue confession of guilt has become the more desirable of two alternatives between which the person was obliged to choose.<sup>105</sup> Other courts have used the test whereby a confession is excluded if it was induced by a threat or promise, or a fear or hope.<sup>106</sup> Still other courts have used the "voluntary" test in conjunction with the "threats or promises" test.<sup>107</sup>

<sup>104</sup> "Testimonial worthlessness is the underlying and fundamental principle on which confession evidence is, under certain circumstances, rejected." *Wilson v. State*, 19 Ga. App. 759, 92 S.E. 309 (1917): "The rules are based on 'the general hypothesis that the truth of statements made under the circumstances referred to is too often questionable. The only object sought in the entire matter is truth.'" *Parker v. State*, 91 Tex. Cr. 68, 238 S.W. 943 (1922). Confessions are not excluded on principles of breach of faith, illegality or the self-incrimination privilege.

<sup>105</sup> "The real question is whether there has been any threat or promise of such a nature that the prisoner would be likely to tell an untruth from fear of the threat or hope of profit from the promise." *United States v. Stone*, 8 Fed. 232, 241, 256 (1881): "The controlling inquiry is whether there had been any threat of such a nature that from fear of it the prisoner was likely to have told an untruth." *Beckham v. State*, 100 Okla. 15, 17, 14 So. 859, 860 (1894).

<sup>106</sup> "Any inducement of profit, benefit or melioration held out; any threat of violence, injury, increased rigor of confinement; or any other menace which can inspire alarm, dread, or the slightest fear, is enough to exclude the confession as not voluntarily made." *Bonner v. State*, 55 Ala. 242, 245 (1876).

<sup>107</sup> "No confession of guilt shall be heard in evidence unless made voluntarily; for if made under the influence of either hope or fear, there is no test for its truthfulness." *State v. Whitfield*, 70 N.C. 356 (1874).

In several American jurisdictions, the legislature has defined the type of inducement that will act to exclude a confession. These statutes usually do no more than accept one of the common law rules.<sup>108</sup> Threats of physical violence have excluded confessions.<sup>109</sup> Promises of pardon have vitiated confessions.<sup>110</sup> Promises of other favorable legal action such as cessation of prosecution, release from arrest or abstention from arrest have also acted to exclude confessions.<sup>111</sup> In considering the mere fact of arrest alone or presence before a magistrate or examination under oath as being sufficient inducements in themselves to render a confession untrustworthy, some courts have adopted the test of "voluntariness" as the sole, absolute and final test.<sup>112</sup>

Because of the use of words like "voluntary" and "involuntary" by courts and other authorities in excluding confessions upon the principle of untrustworthiness, and because of the fact that confessions may also be excluded by reason of the fact that the privilege of self-incrimination has been violated (which is an entirely different doctrine) and because confessions may also be excluded because the "due process" clause of the Fourteenth Amendment has been violated, there has been a great deal of confusion in the field of the law concerning confessions.

#### THE PRESENT FRENCH SYSTEM

##### THE CODE D'INSTRUCTION CRIMINELLE OF 1808

The Code d'Instruction Criminelle adopted in 1808 was a compromise between the pre-revolutionary ideas expressed in the Ordonnance Criminelle of 1670 and the system inaugurated by the Constituent Assembly of 1791 which had been largely borrowed from English law. In the proceedings prior to trial, the system of the Ordonnance of 1670 was to a large extent preserved including a secret investigation by the judge and the refusal of counsel to the accused. At

<sup>108</sup> Colorado, Georgia, Hawaii, Indiana, Kentucky, Minnesota, New York, North Dakota, Oregon, Texas, and Washington have such statutes. Wigmore, *op. cit.* supra note 54, Vol. III, pp. 262, 263.

<sup>109</sup> See cases cited Wigmore, *ibid.*, at Vol. III, pp. 268, 269.

<sup>110</sup> Conley v. State, 12 Mo. 470 (1849); People v. Reilly, 224 N.Y. 90, 120 N.E. 113 (1918); State v. Carr, 37 Utah 191 (1864).

<sup>111</sup> See cases cited, Wigmore, *op. cit.* supra note 54, Vol. III, pp. 274, 275.

<sup>112</sup> "The principle is that no statement made upon oath in a judicial investigation of a crime can ever be used against the party making it, in a prosecution of himself for the same crime; because the fact that he is under oath of itself operates, as a compulsion upon him to tell the truth and the whole truth, and his statement, therefore, cannot be regarded as free and voluntary." Jackson v. State, 59 Miss. 312 (1879).

the trial, the accusatorial system prevailed with public proceedings, oral evidence and the defendant's right to counsel.<sup>113</sup>

In January, 1958, a new Code went into effect in France which has created some changes in the preliminary investigation of crime which will be considered here. Presently, another section of this Code is being prepared which will deal with the trial itself.

#### THE FRENCH COURT STRUCTURE AND PROSECUTION OF CRIME

For administrative purposes, France is divided into 89 *départements* and *territoire*. The *départements* and *territoire* are grouped into 27 judicial districts (*ressorts*) and divided into 356 judicial areas called *arrondissements*. These *arrondissements* are further divided into 3,028 *cantons*.<sup>114</sup> The lowest trial court is the cantonal court in which a justice of the peace (*juge de paix*) sits alone. For criminal cases, this court is known as the *Tribunal de Simple Police*.<sup>115</sup> In each *arrondissement* there is a court known as the *Tribunal de Première Instance* with original and appellate jurisdiction in criminal cases. For the trial of criminal cases, this court is known as the *Tribunal Correctionnel*. An odd number of judges, not less than 3 must sit in each case.<sup>116</sup> There is no permanent criminal court in the *départements* but for the trial of "crimes" a court known as the *Cour d'Assises* is set up every 3 months and oftener if necessary. This court consists of a president and two associate judges (*assesseurs*) who sit with a jury of seven laymen. This is the only court in France, civil or criminal, which has a jury.<sup>117</sup> In each *ressort* there is a *Cour d'Appel* which usually contains two or more sections (*chambres*). This court generally handles criminal appeals from the *Tribunal Correctionnel*. In each *Cour d'Appel*, three judges are assigned to a section (*chambre*) known as the *Chambre des mises en accusation*. It is their duty to decide after the preliminary investigation by the *juge d'instruction* whether or not the accused should be held for trial.<sup>118</sup> The highest court in France is the *Cour de*

<sup>113</sup> Keedy, *The Preliminary Investigation of Crime in France*, pp. 387, 388, 88 U. of Penn. Law Rev. 386, 692, 915 (1940); Ploscowe, *op. cit. supra* note 1, p. 372.

<sup>114</sup> Keedy, *ibid.*, at pp. 392, 393.

<sup>115</sup> Keedy, *ibid.*, at p. 393; Ploscowe, *op. cit. supra* note 1, p. 385.

<sup>116</sup> It is a fundamental principle of the French judicial system that at least 3 judges must sit in order to constitute a court. The lone exception to this is the *juge de paix*. Keedy, *ibid.*, at pp. 393, 394; Ploscowe, *ibid.*, at pp. 385, 386.

<sup>117</sup> Vouin, *The Protection of the Accused in French Criminal Procedure*, pp. 159-161; 5 Int. & Comp. L. Q. 157 (1956); Keedy, *ibid.*, at p. 395.

<sup>118</sup> Keedy, *ibid.*, at pp. 395-397; Ploscowe, *op. cit. supra* note 1, p. 384.

*Cassation*. It has appellate jurisdiction in both civil and criminal cases for the entire country and colonies.

The general term used to describe members of the judicial profession is *magistrature*. Each member is known as a *magistrat* and is appointed by the President of the Republic upon recommendation of the Minister of Justice (*Garde des Sceaux*) who is the head of the judicial system. Members of the prosecuting department are also known as *magistrats* because they are regarded as being non-partisan and judicial. They are called "standing magistrate" (*magistrature debout*) because they stand when addressing the court in contrast to the "sitting magistrats" (*magistrature assise*) who act as judges. These members of the *magistrature* who represent the interests of the government in court are known as the *ministère public*.<sup>119</sup> The head of the *ministère public* is likewise the Minister of Justice. The members of the *ministère public* attached to any court are known collectively as the *parquet*. The chief of the *parquet* attached to each *Cour d'Appel* is called the *procureur général* and prosecutions are conducted in his name both in the *Cour d'Appel* and the *Cour d'Assise* as a representative of the *ministère public*. In addition to this he also supervises the application of penal law throughout the whole district of the *Cour d'Appel*.<sup>120</sup> The *parquet* of the *Tribunal de Première Instance* or *Tribunal Correctionnel* is in the hands of the *procureur de la République*. He prosecutes all cases for the *ministère public* and has various administrative duties.<sup>121</sup> At the level of the *Tribunal de Simple Police*, the function of the *ministère public* is usually carried out by the police commissioner (*commissaire de police*) of the place where the tribunal is.<sup>122</sup>

Offenses are divided according to their gravity into *crimes*, *délits* and *contraventions*. The importance of this division lies in their manner of trial. *Crimes* are tried in the *Cour d'Assise* composed of 3 judges and a jury. *Délits* are triable in the *Tribunal Correctionnel* by 3 judges without a jury. *Contraventions* are tried by a single justice of the peace (*juge de paix*) in the *Tribunal de Simple Police* without a jury.<sup>123</sup>

<sup>119</sup> The *ministère public* enforces public action and demands that the law be applied. It is represented at each court, all decisions are given in its presence and it insures the execution of the decision. Code de Procedure Penale, Arts. 31-33 (1957) Bulletin Législatif Dalloz (hereinafter cited as C.P.); Vouin, op. cit. supra note 136, pp. 8, 9; Keedy, *ibid.*, at pp. 402-404.

<sup>120</sup> C. P., Arts. 34-38; Keedy, *ibid.*, at pp. 405, 406.

<sup>121</sup> C. P., Arts. 39-44; Vouin, op. cit. supra note 117, pp. 8-11; Keedy, *ibid.*, at p. 406.

<sup>122</sup> C. P., Arts. 45-48; Keedy, *ibid.*, at p. 406.

<sup>123</sup> The classification of offenses is complicated due to statutory listings of what classification particular offenses are. However, it may be generally stated that "crimes" can

In order to simplify its study, French criminal procedure may be divided into three stages. The first stage is the preliminary investigation wherein the offence is verified, the circumstances under which it occurred are determined and evidence is gathered. In the second stage all the evidence is weighed in order to decide whether or not the accused should be held for trial. The third stage is the trial itself.

#### THE PRELIMINARY INVESTIGATION

*Police judiciaire.*—The investigation of offences preliminary to trial is carried on by a group known as the *police judiciaire* and by the *juge d'instruction* who, until the new code, was considered a member of the *police judiciaire*. The *police judiciaire* is operated under the direction of the *procureur de la République* and is under the supervision of the *procureur général* in each *Cour d'Appel* district.<sup>124</sup> The *police judiciaire* is, with certain exceptions, in charge of investigating violations of penal law, gathering evidence and finding suspected parties until investigation is begun. When the investigation is begun, it performs tasks assigned to it by investigating officials.<sup>125</sup>

Before the new code, if the *procureur* did not have enough information in order to make a decision he used to institute an investigation known as the *enquête officieuse*. He used to delegate this investigation to the *police judiciaire* who would then employ all the methods which the Code provided for the *juge d'instruction* in conducting his examination. The problem was that the Code did not provide for the use of such procedure by the *police judiciaire* and thus there was much dis-

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be compared to the Anglo-American concept of a felony. *Delits* can be compared to the more serious Anglo-American misdemeanors and "contraventions" to the less serious misdemeanors. It is pointed out that many offenses are brought before the *Tribunal Correctionnel* which are within the jurisdiction of the *Cour d'Assise*. This is accomplished by leaving out certain of the aggravating factors so that the offense has become a *delit* and subject to the jurisdiction of the *Tribunal Correctionnel*. This is done often for purposes of expediency and because it is less expensive since there is no jury trial. There is a better chance for conviction since the dossier is prepared by the *procureur de la République* and it is upon this that the court usually makes its decision. For these reasons, the *Tribunal Correctionnel* has become the busiest criminal court in France.

<sup>124</sup> In the new code, the *procureurs* are not listed as members of the *police judiciaire*. The *police judiciaire* is composed of: Officers, such as mayors and their assistants, officers and sergeants of the police force and police commissioners; agents, who are officials of the active police department and members of the municipal police; officials and agents to whom the law attributes certain judicial duties such as engineers, district chiefs and technical agents of water supply and forests, as well as rural constables. C. P., Arts. 12-29.

<sup>125</sup> C. P., Art. 14.



cussion as to the legality of such action. Besides searches and seizures, the suspect was frequently "invited" to appear for questioning before the *police judiciaire*. During interrogations, the suspect was not informed of the nature of the charge against him, nor was he permitted to have counsel present because the Code did not apply to this informal type of interrogation. There was also evidence of "third-degree" methods being used to extract confessions. The *enquête officieuse* was justified on the following grounds: (1) It was necessary so that the *procureur* should know how to dispose of the case. (2) It saved time and expense. (3) If there were no *enquête officieuse*, it would be necessary to have more *juges d'instruction*. (4) It gave an innocent person a chance to exculpate himself without a formal investigation by the *juge d'instruction*. (5) The local police would arrive more quickly at the truth than a *juge d'instruction* with a formal investigation.

The *enquête officieuse* was criticized because it placed arbitrary power in the hands of subordinate officials. It also was contended that the suspect should have the right to hear the charge and have counsel. It was also argued that the *juge d'instruction* often accepted the results of the *enquête officieuse* without making an investigation of his own. Also, there was no provision for it in the Code.<sup>126</sup>

Today, under the new Code, *enquête officieuse* has been given statutory sanction. The *police judiciaire* on instructions from the *procureur* or acting by virtue of their office may carry out preliminary inquiries. Searches and seizures can only be made with express agreement of the person at whose house this takes place. If it is necessary to hold a person more than 24 hours, he must be taken before the *procureur de la République* who can authorize a further 24 hour period. During this period of detention, the suspect may be interrogated, though the length and details of the interrogation must be noted by the officer of the *police judiciaire* in a written report. A medical examination of the suspect can be ordered by the *procureur de la République* or by the suspect if he demands it after 24 hours.<sup>127</sup> It is provided that the *procureur général* can instruct the *police judiciaire* to gather any information which he thinks will help him to administer justice.<sup>128</sup> The *procureur de la République* also has the power to direct

<sup>126</sup> Keedy, op. cit. supra note 113, pp. 920-924.

<sup>127</sup> C. P., Arts. 75-78.

<sup>128</sup> C. P., Art. 38.

their investigations.<sup>129</sup> The *juge d'instruction* as well, may delegate his duties to the *police judiciaire* so that they have all the powers of the *juge d'instruction* when acting within the limits of that investigation. They are not allowed however, when acting in this capacity, to interrogate or confront the accused. If it is necessary to detain a suspect, they must bring him before the *juge d'instruction* within 24 hours.<sup>130</sup>

In the case of a "flagrant"<sup>131</sup> *crime* or *délit*, the *police judiciaire* must go to the scene of the offence and make any investigations which would be useful.<sup>132</sup> They have the power to make searches and seizures with little limitation.<sup>133</sup> They can also take evidence under oath from people who they feel might be able to help. They may also detain people in the interests of the inquiry for not more than 24 hours, which period can be extended upon written authority from the *procureur de la République* or the *juge d'instruction*. Any interrogations during this period must be noted as to length and details. The suspect has the right to demand a medical examination after 24 hours.<sup>134</sup> The *police judiciaire* hand over the case to the *procureur de la République* upon his arrival. If the offence is a "flagrant" *crime*, the *procureur de la République* may examine the suspect at once. If the suspect brings counsel he cannot be questioned except in the presence of that counsel. If the offence is a "flagrant" *délit*, the *procureur* may place the suspect in custody after interrogation.<sup>135</sup> If the *juge d'instruction* is present, the *procureur de la République* and the officers of the *police judiciaire* hand the case over to him and he proceeds with the investigation.<sup>136</sup>

Thus, the *police judiciaire* can make investigations and interrogate the suspect upon delegation or instructions from the *procureur général*, the *procureur de la République*, the *juge d'instruction*, the *préfet*, or by virtue of their own office. They also have additional powers in the case of a "flagrant" *crime* or *délit*.

*Juge d'instruction.*—The *juge d'instruction* is chosen from the titular judges and nominated by a decree of the President of the Republic

<sup>129</sup> C. P., Art. 41. A *prefet* (Administrative head of a département) can, in urgent cases, start an investigation by the *police judiciaire*. C. P., Art. 30.

<sup>130</sup> C. P., Arts. 81, 151–154.

<sup>131</sup> A "flagrant" *crime* or *delit* is one which is either in the very act of being perpetrated or which has just been perpetrated. It is "flagrant" when the suspected person is being pursued by public hue and cry or is found in possession of objects, or shows signs or indications which lead one to think that that person has just committed a *crime* or *delit*. C. P., Art. 53.

<sup>132</sup> C. P., Art. 54.

<sup>134</sup> C. P., Arts. 60–64.

<sup>136</sup> C. P., Art. 72.

<sup>133</sup> C. P., Arts. 56–59.

<sup>135</sup> C. P., Arts. 68–71.

on introduction by the Council.<sup>137</sup> Like the *procureur de la République* he functions within an *arrondissement*. Before the new Code, he was considered an officer of the *police judiciaire*. In theory this was a result of earlier law when the *juge d'instruction* collected evidence against the accused as a major part of his duties which placed him in the realm of the *police judiciaire*. Secondly, he had decided along with a council of three or more judges (*chambre du conseil*) whether the accused should be brought to trial. This council (*chambre du conseil*) was done away with in 1856 and all its duties were conferred on the *juge d'instruction*. Thus, he became more of a judge than an officer of the *police judiciaire* but he was still considered a member of the *police judiciaire* until the enactment of the new Code.<sup>138</sup>

It is the duty of the *juge d'instruction* to conduct an investigation<sup>139</sup> known as the preliminary examination (*instruction préparatoire*). The *juge* may make such an investigation in three cases only: when directed by the *procureur*,<sup>140</sup> when the person injured by a *crime* or *délit* complains to the *juge* and constitutes himself a *partie civile*;<sup>141</sup> when the offense is considered a "flagrant" *délit*, in which case the *juge* on his own initiative may conduct an investigation.<sup>142</sup>

It must be emphasized that the purpose of this investigation is to determine whether there is enough evidence to hold the suspect for trial. The *juge* is no longer a member of the *police judiciaire* but a member of the "sitting magistracy" (*magistrature assise*) and thus pursues his examination impartially in the sole interest of justice. He has the right, more, a strict duty to find out the facts for himself in order to discover the real truth.<sup>143</sup> The *juge d'instruction* in making this investigation is authorized by law to perform many and varied functions. First, he makes use of all the information and evidence that may

<sup>137</sup> C. P., Art. 50.

<sup>138</sup> Keedy, op. cit. supra note 113, pp. 408, 409.

<sup>139</sup> An investigation usually begins with one of the following: A complaint (*plainte*) by the injured person; a *denonciation* which is an accusation by another person other than the injured party; a written report of an officer of the *police judiciaire* who learned of the offense in the course of his duties; by the *procureur* upon his own motion where he has acquired personal knowledge of an offense. Keedy, *ibid.*, at p. 412.

<sup>140</sup> C. P., Art. 80.

<sup>141</sup> The *partie civile* is the injured party. By filing a complaint (*plainte*) with the *juge* he sets in motion a criminal prosecution and civil action for damages. It is an interesting characteristic of French law that criminal and civil actions may be tried *together*. The *procureur* can only instruct the *juge* not to investigate in this case if the facts have no penal character. C. P., Arts. 85-91; Vouin, op. cit. supra note 117, pp. 11, 12.

<sup>142</sup> C. P., Arts. 51, 72. In this case, he carries out all the duties of the *police judiciaire* in the case of a flagrant *crime* or *délit*.

<sup>143</sup> Vouin, op. cit. supra note 117, pp. 13, 14.

have been gathered by the *police judiciaire* in their duties which have just been discussed. Besides this he may (1) visit the scene of the crime (*transport*) and make searches (*perquisitions*) and seizures (*saisies*);<sup>144</sup> (2) issue orders (*mandats*) to bring the suspect before him and then to detain him;<sup>145</sup> (3) keep the accused detained (*détention préventive*) or grant him a conditional release (*liberté provisoire*);<sup>146</sup> (4) interrogate the suspect (*interrogatoire*);<sup>147</sup> (5) summon and hear witnesses;<sup>148</sup> (6) reconstruct the crime (*reconstitution*);<sup>149</sup> (7) appoint experts to conduct special investigations (*expertises*);<sup>150</sup> (8) delegate certain of his functions to other officials (*délégation*).<sup>151</sup>

The most ancient feature of this investigation is the interrogation (*interrogatoire*) of the suspect. It is also the most characteristic and probably the most important part of the investigation since it may lead to a confession and because the *juge* cannot order the committal for trial until he has heard the suspect. The theoretical purpose of the *interrogatoire* is the ascertainment of truth.

[I]t is necessary to consider it [the *interrogatoire*] as being at the same time a means of defense and a means of investigation; its object is to hear the explanations of the suspect for the purpose of verifying them, to record his denials or his admissions, to search for the truth of the facts in his convincing or contradictory statements.<sup>152</sup>

The *interrogatoire* is conducted secretly in either the cabinet of the *juge* or in the jail. The number of the *interrogatoires* is left entirely to the discretion of the *juge*. All that occurs during the proceedings is noted though the suspect is not under oath.<sup>153</sup> The suspect cannot be questioned by anyone except the *juge*.<sup>154</sup>

<sup>144</sup> C. P., Arts. 92-100; Keedy, op. cit. supra note 113, pp. 693-697.

<sup>145</sup> C. P., Arts. 122-136; Keedy, ibid., at pp. 697-701. These *mandats* also provide for the immediate interrogation of the suspect within 24 or 48 hours or he will be freed.

<sup>146</sup> C. P., Arts. 137-150; Keedy, ibid., at pp. 701-705; Vouin, op. cit. supra note 117, pp. 19-21. This provisional measure has been severely criticized.

<sup>147</sup> C. P., Arts. 81, 114-121, 125, 133; Keedy, ibid., at pp. 705-712.

<sup>148</sup> C. P., Arts. 101-113; Keedy, ibid., at pp. 712-716.

<sup>149</sup> Keedy, ibid., at p. 722. <sup>150</sup> C. P., Arts. 156-169; Keedy, ibid., at pp. 716-722.

<sup>151</sup> C. P., Arts. 81, 151-155; Keedy, ibid., at pp. 723-727; Vouin, op. cit. supra note 117, pp. 14, 15.

<sup>152</sup> Faustin Helie as quoted by Keedy, ibid., at p. 706.

<sup>153</sup> The Ordonnance of 1670 required that the accused be sworn. This was abolished in 1789. Keedy, ibid., at p. 706.

<sup>154</sup> The Code specifically states that even though the *juge* delegates his duties to the *police judiciaire*, they still do not have the power to interrogate the suspect. C. P., Art. 152.

The Code provides for at least two appearances of the suspect before the *juge d'instruction*. At his first appearance, the *juge* will verify the identity of the suspect, tell him expressly each charge against him and warn him that he is free not to make a declaration. If the suspect wishes to make a declaration the *juge* takes it at once. If the *juge* is of the opinion that the accused should be examined, he must inform the suspect of his right to counsel. If the suspect wishes, he will have one officially chosen for him.<sup>155</sup> The *juge* may carry out an immediate interrogation if the matter is urgent,<sup>156</sup> but other than this, the first appearance is regarded as a preliminary proceeding in order to inform the suspect of his rights and give him an opportunity to explain away the charge. Thus, as a general rule, the *juge* may not question the suspect at his first appearance.

At least two days before the interrogation, counsel for the suspect is summoned by a registered letter. The proceedings must also be placed at the disposition of the counsel for the suspect at least 24 hours before each interrogation.<sup>157</sup> The *procureur* may also be present at the *interrogatoire*.<sup>158</sup> During the *interrogatoire*, the *procureur* and counsel for the suspect can only ask questions after receiving the permission of the *juge*.<sup>159</sup> Counsel for the suspect listens to the *interrogatoire* and makes notes. His role is to keep a check on the *juge*. If the suspect refuses to answer, the *juge* is provided with no means of compulsion. If the suspect persists, mention of this must be made in the *procès-verbal* and if the suspect is brought to trial, the court may draw an unfavourable inference from the fact of such refusal.<sup>160</sup>

As soon as the *juge d'instruction* considers the investigation completed he sends the dossier to the *procureur de la République*, who must return his order within 3 days. If the *juge* feels the facts do not

<sup>155</sup> C. P., Art. 114.

<sup>156</sup> C. P., Art. 115.

<sup>157</sup> Counsel for the suspect may also communicate freely with the suspect even though he be in custody. C. P., Arts. 116, 118.

<sup>158</sup> C. P., Art. 119. Prior to the new code, there was no legal sanction for the presence of the *procureur*.

<sup>159</sup> C. P., Art. 120. Under the Code of 1808, the suspect was not informed of the charge against him. He was denied the right to have counsel present during the interrogation and was frequently not allowed to communicate with anyone. The *juge* too often acted as a prosecutor and attempted to procure confessions. In 1897, all this was abolished. Keedy, op. cit. supra note 113, pp. 707, 708.

<sup>160</sup> The Code states that the *juge* must warn the suspect at his first appearance that he is free not to make a declaration. C. P., Art. 114. This is generally interpreted to apply only to the first appearance and not to the *interrogatoire*. Keedy, *ibid.*, at pp. 710, 711.

constitute a *crime*, *délit* or *contravention*, he declares a non-suit by decree. If he thinks the facts constitute a *contravention*, he decrees that the case be remitted to the *Tribunal de Simple Police*. If he thinks the facts constitute a *délit*, he decrees that the case be remitted to the *Tribunal Correctionnel*. If he thinks the facts constitute a *crime*, he decrees that the dossier and statement of evidence be sent by the *procureur de la République* to the *procureur général* at the *Cour d'Appel* so that the *Chambre d'Accusation* can decide whether the suspect should be held for trial.<sup>161</sup>

Thus, if the offence charged is a *crime*, there has probably been an investigation by the *police judiciaire* under the *procureur de la République* and an independent examination by the *juge d'instruction*. The suspect has probably been interrogated by the *police judiciaire* and by the *juge d'instruction*. The result of these investigations is all contained in one dossier which is now sent up to the *Chambre d'Accusation* which will decide if the suspect should be tried in the *Cour d'Assise*.

#### THE CHAMBRE D'ACCUSATION

Each *Cour d'Appel* contains at least one *Chambre d'Accusation*. It is composed of a full-time president and two counsellors who meet at least once a week.<sup>162</sup> The *procureur général* institutes proceedings when he receives the dossier and *juge's* decree from the *procureur de la République* and also informs each party by registered letter when the case is to be heard. The hearing is carried out in the *Chambre du Conseil*. Written arguments may be submitted by counsel for the parties if they request to do so. The *procureur général* and counsels for the parties are allowed to make brief observations under the new Code. The *chambre* may also order parties to appear in person or have evidence brought before it.<sup>163</sup>

When the hearing is finished, the *Chambre d'Accusation* will discuss

<sup>161</sup> C. P., Arts. 175-184. The *procureur*, suspect and *partie civile* all have the right to appeal the *juge's* decree to the *Chambre d'Accusation*. C. P., Arts. 185-187.

<sup>162</sup> C. P., Arts. 191-193. France introduced a grand jury in 1791 which differed from the English version. In 1808 it was abolished because the French did not fully understand its operation. To take its place, they instituted the *Chambre du Conseil* which was abolished in 1856. Today, the *Chambre d'Accusation* fulfills their duties. Ploscowe, op. cit. supra note 1, pp. 381-384. Also see Vouin, op. cit. supra note 117, pp. 23-25; Keedy, op. cit. supra note 113, pp. 931-933.

<sup>163</sup> C. P., Arts. 194-199. Under the old Code the proceedings were secret. The *partie civile* or the suspect were not allowed to be present. The *chambre* did not hear any witnesses but based its findings entirely on the dossier and the arguments of the *procureur general* as well as those submitted by the suspect. Keedy, *ibid.*, at pp. 932, 933.

the case in secrecy. The *procureur general*, the parties or their counsel or the clerk cannot be present.<sup>164</sup> It can order any further investigation it thinks necessary. It can also, with the agreement of the *ministère public*, free the suspect. If it feels the facts constitute a *délit* or *contravention* it refers the case to the proper tribunal. If it thinks the facts constitute a *crime*, the *chambre* declares the case is to be referred to the *Cour d'Assise*.<sup>165</sup> At this point the accused has probably been investigated and interrogated by the *police judiciaire*, the *juge d'instruction* and maybe even by the *Chambre d'Accusation*.

#### THE TRIAL

When the *Chambre d'Accusation* has committed the accused to trial at the *Cour d'Assise*, the *procureur général* draws up a bill of indictment (*acte d'accusation*) which is a *résumé* of the charges and effects, the service of this bill and the judgment of committal. He gives notice of the list of the witnesses to be called by the prosecution and finally transfers the accused and his dossier to the *Cour d'Assise*.<sup>166</sup>

Before the trial begins, the accused makes his formal appearance and seven qualified jurors are chosen by lot from the jury list for the session.<sup>167</sup> The accused can challenge up to 4 jurors, the prosecution only 3. The president then asks the accused his identity, receives the oath of the jurors, orders the reading of the judgment of committal and the bill of indictment and then orders the witnesses to leave the courtroom.<sup>168</sup>

<sup>164</sup> C. P., Art. 200.

<sup>165</sup> C. P., Arts. 201, 202, 212-217. The *Chambre d'Accusation* also hears appeals from the decrees of the *juge d'instruction* and exercises a general supervision over all the proceedings of the preliminary investigation. C. P., Arts. 219-230.

<sup>166</sup> Vouin, *op. cit.* supra note 117, pp. 164, 165.

<sup>167</sup> The Code of 1808 provided that all questions of fact as to the guilt of the accused lay with 12 jurors by majority vote. The court handled all questions of law. Mistrust crept into this relationship and juries began returning verdicts of "not guilty" rather than allow the court to impose an excessively severe sentence. In 1824, as a concession, a law was passed allowing the court to find "extenuating circumstances" for mitigation but the juries still persisted in their systematic acquittals. In 1832, as another concession, a law was passed allowing the jury to find mitigating circumstances. Finally, after a century of difficulty, it was decided in 1932 that the jury, after deliberating alone on the question of guilt should join with the judges to decide on the sentence. In 1941, the jurors were reduced from 12 to 6 and it was decided that the court and jury should deliberate together on first, the question of guilt, and then the sentence all in one deliberation. In 1945, juries were increased to 7 people so that today a majority out of 10 people, 3 judges and 7 jurors, decide the innocence or guilt and sentence of the accused. Vouin, *ibid.*, at pp. 162, 163; Ploscowe, *op. cit.* supra note 1, pp. 389-391.

<sup>168</sup> Vouin, *ibid.*, at pp. 166, 167.

The trial begins after the withdrawal of the witnesses with the examination of the accused (*l'examen de l'accusé*) though such procedure is not prescribed by the Code.<sup>169</sup> This interrogation is often a long monologue by the president dealing with the past history of the accused including past offences. This is justified upon the theory that both conviction and sentence must be taken into consideration in one deliberation. The accused does not have to reply to the president's interrogation though this may be held against him.<sup>170</sup>

Following the interrogation of the accused the witnesses are interrogated (*l'interrogatoire des témoins*). In France, witnesses testify "spontaneously," that is to say, without being questioned. After this "spontaneous" testimony they may be questioned by the president, or the parties through the president as intermediary. Then various steps follow such as expert evidence, production of exhibits, or a visit to the *locus in quo*. The prosecution then makes his plea for conviction (*la réquisitoire*). After this, if there is a *partie civile*, his counsel speaks, followed by a representative of the *ministère public* and finally counsel for the accused. The prosecution may reply but the accused is always given the final word.<sup>171</sup> At this point the president used to sum up the case for the jury, calling their attention to the most important evidence produced and reminding them of their functions. Because it was felt that such summing up was often unfavorable to the accused, it was abolished in 1881.

The hearing concluded, the president draws up and reads the questions which are going to be put to the court for resolution. Each of the questions are drawn up so that they can be answered "yes" or "no." The court and jury then retire into a room to deliberate which they cannot leave until they have reached a majority verdict. First, they deliberate on guilt and then on penalty without interruption.

<sup>169</sup> Under the "*ancien régime*" the president had always been able to interrogate the accused. Before 1881, there were signs of a tendency among many judges to confine the interrogatory to more reasonable limits or even to abandon it entirely. Then a law was passed prohibiting the summing up of the judge at the close of the trial (*le résumé*). Deprived of the opportunity which the summing up affords him of expressing his opinion, the judges revived the interrogatory so that what he formerly said in the *résumé*, he now says in the interrogatory. Other reasons suggested for this interrogation are: the president's duty to expose the case to the jury; the president's discretionary power to use whatever measures he deems necessary to bring out the truth; some feel this is just a hang-over from the inquisitional procedure. Such procedure is prescribed by the Code for the *Tribunal Correctionnel* and the *Tribunal de Simple Police*. Vouin, *ibid.*, at pp. 167-169; Ploscowe, *op. cit. supra* note 1, pp. 388, 389.

<sup>170</sup> Vouin, *ibid.*, at p. 168; Ploscowe, *ibid.*, at pp. 388, 389.

<sup>171</sup> Vouin, *ibid.*, at pp. 168, 169.



The judgment is then read in open court without expressing the grounds of the decision.<sup>172</sup>

The French system of evidence appears quite shocking to the Anglo-American jurist.

All evidence which is reasonably probative, whatever it may be, is admissible in criminal proceedings because for us there is one supreme proof which overshadows all the others and alone decides the issue: this is what we term the "profound personal conviction" (*intime conviction*) of the judge.<sup>173</sup>

Like the judge, the duty of the juror is defined in his oath as follows:

You swear and promise before God and men . . . to decide in accordance with the charges and the grounds of defence following your conscience and your personal conviction (*intime conviction*), and with the impartiality and firmness which befits a free and honest man.<sup>174</sup>

The importance of this principle of evidence lies in the fact that everything can be considered as evidence, up to the demeanor of the accused at the trial.<sup>175</sup> The testimony of the accused in a system such as this naturally plays a major part. Every interrogation that he takes part in, from the *police judiciaire*, the *procureur de la République*, the *juge d'instruction* or the *Chambre d'Accusation* is noted together with other evidence in the dossier which is considered by the *Cour d'Assise* where the accused is again interrogated. What the accused has said during these interrogations will do much to shape the "*personal conviction*" of judge and jury.

#### THE PRESENT ENGLISH SYSTEM

##### ENGLISH CRIMINAL COURTS

In Norman times, the king's court was merely one of the many courts but as has been seen, it gradually encroached upon the jurisdiction of other courts until it had jurisdiction of virtually all criminal matters. This increase in judicial activity led to institutional changes for since the king and his court could no longer travel around to various counties and hear criminal cases, he and his court stayed in Westminster while his representatives travelled around and tried cases

<sup>172</sup> Vouin, *ibid.*, at pp. 169, 170; Ploscowe, *op. cit. supra* note 1, p. 390.

<sup>173</sup> Vouin, *ibid.*, at p. 15.

<sup>174</sup> Vouin, *ibid.*, at p. 170.

<sup>175</sup> "Nothing is silent, nothing is useless at the hearing: the countenance, the composure or agitation, the variations and changes of expression, the various impressions form a collection of signs which, to a greater or lesser extent, lift the veil enveloping the truth." As quoted by Vouin, *ibid.*, at p. 171.

in his name.<sup>176</sup> These itinerant justices visited counties three or four times a year with commissions from the king to try and hear cases. This became known as the Assize Court.<sup>177</sup>

However, since these justices of Assize had to hear civil cases as well as criminal cases, they soon found that they were wasting valuable time on petty cases while not being able to handle all the serious criminal cases, which were increasing in number. Therefore, statutes were passed providing that worthy men should be appointed to keep the peace and hear and determine felonies at sessions four times a year. These men, known as justices of the peace, were appointed for counties and assembled four times a year to form the court known as Quarter Sessions. They were allowed to try felonies but more difficult cases were reserved for the judge at Assize. In the 15th and 16th centuries, due to the volume of criminal cases, these justices were given the power to hear and determine petty offences in a summary fashion. They were also instructed to hold preliminary inquiries into allegations of crime that might lead to trial at Assize or Quarter Sessions.<sup>178</sup>

Today, the system is much the same. Petty offenses are now tried summarily by justices sitting in a regular court house and following a regular procedure. The name Magistrates' Court is given to this court.<sup>179</sup> These justices or magistrates also make preliminary inquiry

<sup>176</sup> The king's court at Westminster soon split into judicial institutions and groups of advisors and officials known as the King's Council. The judicial institutions became known as: The Court of Common Pleas and handled disputes between subject and subject; Court of the King's Bench which handled cases where the King was particularly concerned; Court of Exchequer which handled revenue cases. The King's Council soon divided into the House of Lords and the House of Commons. See Plucknett, *op. cit.* supra note 29, pp. 83-106, 139-156.

<sup>177</sup> Jackson, *Machinery of Justice in England*, pp. 4, 5 (2nd Ed. Cambridge, 1956). One commission was that of "Oyer and Terminer," giving authority to try all prisoners committed to a particular Assize. The other is that of "General Gaol Delivery," giving authority to try all prisoners who are in gaol or who have been released on bail, whatever may have been the Assize at which the bills against them were preferred. The same commissions are used today. Kenny, *Outlines of Criminal Law*, pp. 453, 454 (16th Ed. Cambridge, 1956).

<sup>178</sup> A petty offense was dealt with summarily, there being virtually no rules of procedure. In a more serious case, the justices would hear evidence for the prosecution in order to determine whether a *prima facie* case had been made out against the accused. If so, the accused would be committed for trial at the next Assize or Quarter Sessions. A grand jury of 23 men of substantial position was summoned who were presented with a formal accusation, called an indictment, against the accused. The grand jury heard the evidence of the prosecution and deliberating in secret, voted a true bill or a no true bill. If they found a true bill, then the accused stood indicted and trial proper would proceed before a trial jury. Jackson, *ibid.*, at pp. 83, 84.

<sup>179</sup> They used to be called Petty Sessions and consisted of two or more lay justices or one paid magistrate. In the metropolis, these same courts were often called "police courts" due to the prominence of police in the proceedings. The justices of the Peace

into indictable offenses and ascertain judicially whether the prosecution has produced evidence on which the accused ought to be sent for trial at Assize or Quarter Sessions.<sup>180</sup> Other courts of criminal jurisdiction are the House of Lords,<sup>181</sup> the Court of Criminal Appeal<sup>182</sup> and the Queen's Bench Division of the High Court of Justice.<sup>183</sup>

#### ENGLISH CRIMINAL PROCEDURE

Anglo-American criminal procedure is commonly called "accusatorial" in contrast to the "inquisitorial" system of the continent. Under the accusatorial system, someone, usually called the prosecutor,

Act of 1949 changed their names to Magistrates' Courts. Though the terms magistrate and justice are synonymous, the distinction is sometimes made that a magistrate is paid while a justice is not. Jackson, *ibid.*, at pp. 84, 85, 86.

<sup>180</sup> Statutes have divided criminal offenses into: (1) Indictable offenses that must be tried on indictment before a jury (almost all serious crimes are in this category); (2) Indictable offenses that can be tried either on indictment or in Magistrates' Courts; (3) Offenses that are both indictable and summary; (4) Summary offenses in which the accused can demand trial on indictment; (5) Summary offenses triable only in summary courts. Jackson, *ibid.*, at pp. 86, 87. The Assize courts can try any indictable offense whatever and are the most important of the criminal courts of first instance. The Quarter Sessions can try all indictable offenses with certain exceptions. In London, the function of the Assizes is discharged by the Central Criminal Court commonly known as the "Old Bailey." Kenny, *op. cit. supra* note 177; Jackson, *ibid.*, at pp. 89, 90, 91.

<sup>181</sup> The House of Lords has a two-fold jurisdiction as a court of appeal and as a court of first instance. There may be an appeal from the Court of Criminal Appeal on any point of law which the Attorney General certifies to be of such exceptional public importance that it is desirable to have the highest decision. Trial by peers was abolished in 1948. Kenny, *ibid.*, at pp. 449, 450; Jackson, *ibid.*, at pp. 98, 105, 106.

<sup>182</sup> The common law provided no court of appeal in criminal cases, so that judges used to hold informal meetings to discuss questions of difficulty. This practice was superseded by the establishment of a formal tribunal, the "Court for Crown Cases Reserved" with power to determine points of law that arose upon the trial of any prisoner at either the Assizes or Quarter Sessions. By the Judicature Acts, this jurisdiction was transferred to the High Court of Justice. Finally in 1907, a more comprehensive principle was established by the Criminal Appeal Act which created a general court of criminal appeal over the law and fact. Kenny, *ibid.*, at pp. 451, 452. Jackson, *ibid.*, at pp. 103-105.

<sup>183</sup> This tribunal exercises the jurisdiction of the old King's Bench which passed to the High Court by the Judicature Acts and there assigned to the Queen's Bench Division. It has original jurisdiction in 3 classes of offenses: (1) Any misdemeanor when an information has been filed by the King's Attorney-General; (2) Any indictable crime that has been committed in the county of London and the county of Middlesex; (3) Any indictable crime, an indictment which has been found in some other court and has since been removed by order into the Queen's Bench for trial. It can also review the proceedings of Quarter Sessions or of any still lower tribunal. Kenny, *ibid.*, at 452, 453. Jackson, *ibid.*, at pp. 95-97. The Coroner's Court has a history of some seven hundred years and was originally designed to collect fines for the king in criminal cases. Its function is to hold inquests in violent or unnatural deaths. It is a fact finding body incapable of trying any issue but if the verdict at the inquest is one of homicide by a named person, then that person is committed for trial and it is equivalent to an indictment. Kenny, *ibid.*, at p. 456; Jackson, *ibid.*, at pp. 98-100.

formulates a charge and presents it against the accused who meets the charge before a fair and impartial tribunal.<sup>184</sup> In England all prosecutions are nominally at the suit of the Crown though in most cases, any member of the public may prosecute. Thus, though there is a Director of Public Prosecutions who prosecutes the more serious cases,<sup>185</sup> the majority of cases are prosecuted by "private persons."<sup>186</sup> The majority of these private prosecutions are "police prosecutions," instituted by police officials, who from their own knowledge, or from complaints, decide that a charge should be made.<sup>187</sup>

In both summary and indictable offenses, the presence of the defendant is secured before the justices either by a summons,<sup>188</sup> a warrant<sup>189</sup> or an arrest.<sup>190</sup> If the case is one that can be handled summarily,

<sup>184</sup> In the "inquisitorial system," the judge himself investigates a complaint and then upon finding out the facts for himself, decides what ought to be done according to law. See Williams, *op. cit. supra* note 60, pp. 27, 28; Jackson, *ibid.*, at pp. 60-62, 106.

<sup>185</sup> The Director of Public Prosecutions is an official appointed by the Home Secretary from barristers or solicitors of 10 years standing. His greatest importance lies in the fact that he is the co-ordinating and controlling element throughout all prosecutions. He has considerable power and influence. His main functions are to: give advice on prosecution; to be kept informed on most offenses and prosecutions; to prosecute in all cases punishable by death and in cases referred to him by government departments or in any case which appears to him to be of importance or difficulty or which for any other reason requires his intervention. Only a small proportion of actual prosecutions are undertaken by the Director and then the actual steps are taken by members of his staff or by a solicitor appointed by him. Jackson, *ibid.*, at pp. 114-116.

<sup>186</sup> The term "private persons" actually means practically any prosecution other than by the Director of Public Prosecutions. Thus, the term includes a prosecution by any citizen as well as a prosecution by a police officer acting under orders from his chief which is called "police prosecution." Government departments or local authorities also prosecute though usually by their own legal departments. These private prosecutors must usually hire their own solicitors unless the case falls under the jurisdiction of the Director of Public Prosecutions. If the case is to be tried at Quarter Sessions or Assize, a barrister must also be hired. Jackson, *ibid.*, at pp. 108-110, 117.

<sup>187</sup> The police usually conduct their own prosecutions in Magistrates' Courts while for trials at Quarter Sessions or Assize they hire solicitors and barristers. Jackson, *ibid.*, at pp. 110-113.

<sup>188</sup> A summons is merely a formal written notification to the defendant that he is to attend court on a given day. Jackson, *ibid.*, at p. 118.

<sup>189</sup> Between the 14th and 17th centuries, summonses and warrants developed and took the place formerly occupied by the "hue and cry." Since Justices of the Peace were assigned to keep the peace, they were also empowered to arrest a suspected person. Rather than do it himself, the Justice authorized the constable to arrest the suspect and make a search if necessary by virtue of a warrant. This right was after some dispute, finally recognized by statute in 1848. Stephens, *op. cit. supra* note 30, Vol. I, pp. 189-192. Thus, today it is a special authorization for arrest. Kenny, *op. cit. supra* note 177, p. 472.

<sup>190</sup> Arrest can be made by constables and private persons without a warrant under certain circumstances. Kenny, *ibid.*, at pp. 473-476. The person is entitled to know upon what charge or suspicion he is seized. Failure to do so gives rise to an action of false imprisonment. Kenny, *ibid.*, at p. 476.

the Magistrates' Court will proceed to deal with the matter. The substance of the charge is stated to the defendant who is then asked if he admits its truth. If he denies its truth, the trial proceeds. The prosecutor opens his case by a speech and then calls his witnesses. The defendant may then similarly open his case and his witnesses are similarly heard. Neither side has the right to make a second speech. The decision of the justices is then given.<sup>191</sup>

If the offense charged is one that must be tried upon indictment, the justices do not try the case but hold a preliminary inquiry.<sup>192</sup> The magistrate sits as a judge with no interest in the case prior to the examination.<sup>193</sup> The testimony is open,<sup>194</sup> accusatory and confrontative. The accused has the right to counsel and cross-examination. The presence of the accused is absolutely essential. The prosecutor begins by opening his case with any necessary explanation and then calls his witnesses who give their evidence exactly as they would at trial.<sup>195</sup> This finished, if the justices feel that a *prima facie* case has been made out against the accused, the charge must be read to him and explained in ordinary language. He must then be asked if he has anything to say in answer to the charge, and told that he need not say anything but that if he does say anything it will be taken down in writing and may be used in evidence at the trial. The justices also ask the accused if he wishes to be sworn and give evidence and if he wishes to call witnesses. If he does so wish, the justices must proceed to take such evidence. The accused may either remain silent or leave it to his counsel to make a statement or make one himself. If the accused does make a statement, it is taken down in writing and afterwards read over to him and signed by one of the examining justices. The prisoner's witnesses, if

<sup>191</sup> Kenny, *ibid.*, at p. 460; Jackson, *op. cit. supra* note 177, pp. 119, 120.

<sup>192</sup> The preliminary hearing is one of the modern developments of criminal procedure. Early law did not contemplate any preliminary inquiry into the guilt or innocence of a defendant but he was tried immediately following an accusation. The inquest of the coroner having some characteristics of a preliminary investigation, probably influenced the passage of a series of statutes in the 16th century giving Justices of the Peace the power to hold preliminary investigations. The Magistrate was not acting judicially but inquisitorially interrogating the prisoner in secret without counsel for the purpose of aiding the prosecution. Stephens, *op. cit. supra* note 30, Vol. I, pp. 216-229.

<sup>193</sup> This change from the older system when he acted more like a prosecutor is no doubt due to the establishment of a modern professional police force in the 19th century thus allowing them to "get up" the case and leaving the judge a neutral arbiter.

<sup>194</sup> Kenny indicates that despite statutory language preliminary examinations may not be "open" in practice. Kenny, *op. cit. supra* note 177, p. 477.

<sup>195</sup> The clerk takes down their testimony which is signed by each witness and is known as a deposition.

any, are examined and their evidence is taken down in writing and signed by the witness and the justices.<sup>196</sup>

The justices must then decide if there is a *prima facie* case against the accused so as to commit him for trial at the Quarter Sessions or Assize. In cases other than treason, the justices can decide to keep a committed person in prison or release him upon a recognizance, usually with sureties, that he will surrender himself into custody to take his trial when designated.<sup>197</sup> The depositions and a copy of any statement the accused may have made are then transferred to the clerk of the Quarter Sessions or Assize Court as the case may be. The clerk of the trial court usually draws up the indictment and then signs it. Since the abolition of the grand jury this is all that is necessary and the prisoner stands indicted.<sup>198</sup> The accused must then appear in person at the bar of the court to be arraigned by hearing the indictment read and to plead to it. He may plead guilty, stand mute, take some legal objection to the indictment or plead to it.<sup>199</sup> If the accused pleads "not

<sup>196</sup> If represented by counsel, this advocate is heard either before or after the evidence of the accused. If the accused himself gives evidence then the advocate with consent of the justice may be heard before and after such evidence in which case the prosecution is entitled to reply. Otherwise, the prosecution can make no second speech. Kenny, *op. cit.* *supra* note 177, pp. 476-479; Jackson, *op. cit.* *supra* note 177, pp. 120, 121.

<sup>197</sup> The right to bail is almost as old as the law of England itself because in the early days there would otherwise have to be imprisonment until the sheriff made his tour, which could be years. Thus, it was a matter of the greatest importance to receive a provisional release from custody. Stephens, Vol. I, pp. 233-243. Today, in very few serious offenses such as murder, bail is not granted, but otherwise it is discretionary. The Bill of Rights also forbids excessive bail which amount is up to the judgment of the justice himself. Jackson, *ibid.*, at p. 121; Kenny, *ibid.*, at pp. 480-482.

<sup>198</sup> Up until 1933, a bill of indictment had to be presented before a grand jury of from twelve to twenty-three persons. If the grand jury found a true bill, the bill became an indictment and was presented to the petty jury. The origins are seen in the old Frankish inquests and the Assize of Clarendon of 1166. Their duty was merely to decide whether there was a *prima facie* case for presentation to a petty jury. They heard the evidence of the prosecution in secret and saw neither the defendant nor his witnesses. In 1933, the grand jury was abolished for reasons of economy. Kenny, *ibid.*, at pp. 487, 488; Jackson, *ibid.*, at p. 122.

It must also be remembered that an accused person can be brought to trial by other means than through the process of commitment by a justice. An information, that is, a written complaint made on behalf of the crown by one of its officers and filed in the Queen's Bench Division dispenses with an examination before a Justice of the Peace. It can only be used in misdemeanors. There can also be an indictment by a coroner's inquisition in the case of homicide which dispenses with a preliminary examination. Kenny, *ibid.*, at p. 486. Today any person can prefer a bill of indictment charging an indictable offense provided that the accused has been committed for trial or that the bill is preferred by direction or with consent of a judge of the High Court. This bill becomes an indictment when signed by the proper clerk.

<sup>199</sup> Kenny, *ibid.*, at pp. 496-501.

guilty," the next stage in the proceedings is trial by jury, the history of which has already been discussed.

A panel list of qualified jurors is returned by the sheriff in each county at every Assize from which the clerk calls 12 names whom the accused may challenge.<sup>200</sup> The jury is then sworn and in cases of felony or treason, the indictment is read to them, which is known as "charging" the jury.<sup>201</sup>

The prosecution then "opens" the case by addressing the jury in order to direct their minds to the main issues in dispute, telling them what evidence he plans to introduce and explaining its bearing on the case. He then calls his witnesses who are examined in chief, cross-examined and re-examined, successively.<sup>202</sup> This done,<sup>203</sup> the counsel for the defense "opens" his case and then his witnesses are examined, cross-examined and re-examined. Counsel for the defense then makes a second speech summing up the defense to which the prosecution makes a speech in reply. The testimony of the accused will be considered in the following sections.

Following the full statements of the cases for each side, it becomes the duty of the judge to sum up the case to the jury. He directs the jury as to any points of law that are involved in the case and also addresses them as to the relevancy and value of the evidence.<sup>204</sup> After the summing-up, the jury retires to consider its verdict which must be unanimous.

<sup>200</sup> The qualifications for jurors are: 1) over 21 years of age; 2) must be the owner, in fee or for life, of lands or tenements worth 10 pounds a year or by long leaseholds worth 20 pounds a year or else the occupier of a house rated at 20 pounds a year. Challenges are rare in England probably because there is not so great a fear of prejudice as in America where the divergence between people is much greater. Kenny, *ibid.*, at pp. 503, 504.

<sup>201</sup> Kenny, *ibid.*, at p. 504.

<sup>202</sup> The crown counsel is a minister of justice whose function is to assist the jury in arriving at the truth. "It is not his duty to obtain a conviction by all means." "The Crown has no interest in procuring a conviction. Its only interest is that the right person should be convicted, that the truth should be known, and that justice should be done." Kenny, *ibid.*, at p. 505, quoting Sir. J. Holker and Lord Hewart.

<sup>203</sup> Defense counsel may ask that the case be withdrawn from the jury because the prosecution has not established a *prima facie* case. As a general rule, the prosecution must close their case before the defense begins and stand or fall by the evidence they have given. However, if some new matter arises, "which no human ingenuity can foresee" the judge may himself call a witness. He may also do so when the case for the defense is closed. Kenny, *ibid.*, at pp. 505, 506.

<sup>204</sup> The Court of Criminal Appeal sets an enforceable standard that the summing-up be adequate and accurate. The judge may also ask the jury to answer definite questions of fact which they are entitled to refuse and if they prefer, return a general verdict. Kenny, *ibid.*, at p. 507.

THE CRIMINAL EVIDENCE ACT, 1898<sup>205</sup>

The provisions of this Act can be more easily understood in the light of the foregoing historical development of English criminal procedure. Early criminal procedure, through a system of proofs such as ordeals, compurgation or trial by battle, placed the burden of proof directly on the accused to exculpate himself. Since these proofs were permeated with the religious element, any other method of trial would probably have seemed as revolting to an accused person as these methods of proof seem to us today. When these methods of proof were gradually done away with, there was little public reaction because society had accepted the fact that they were barbaric and outmoded. Likewise, society accepted the introduction of trial by jury or "trial by the countryside" because it was familiar with this manner of procedure. There was no reaction against the interrogation of the accused during this trial because there was no reason why the accused should *not* be interrogated. It was quite logical to question the accused since he should know more about his innocence or guilt than anyone else and besides, a society used to ordeals, trial by battle and compurgation could see nothing wrong with merely questioning an accused person.

However, when ecclesiastical courts and then later, the Star Chamber began to question people without first accusing them by one of the time honored methods to which the public was accustomed, there was a reaction. The English people did not like this arbitrary questioning of any person by the courts or government. For centuries a person had always been accused by one of the formal methods of accusation before he went to trial where he was interrogated freely. This was all right, but to call a person in and question him without accusation seemed abhorrent to the English people. The reaction against this interrogation continued for centuries. With each year it became a broader and more traditional principle than the year before until finally, at the end of the 17th century, it was claimed flatly that, "no man is bound to incriminate himself."

Historically it is presumed that civil parties to a suit were first held incompetent to testify as witnesses because this would be invoking another manner of trial into trial by jury which would be completely unnecessary. However, after some centuries, courts theorized that a party to a suit was incompetent because of his interest in the case and

<sup>205</sup> 61 & 62 Vict. c. 36 (1898).



that therefore he was sure to lie and sure to be believed by the court and jury. This rule was subsequently adopted by the criminal courts. Originally, this rule and the principle behind it were not questioned. Society felt that there was nothing unfair in this rule and especially so in criminal cases, for there the accused was allowed to tell his story in the form of an unsworn statement. When Bentham attacked this rule and the principle behind it, he set off a chain of public reaction which led to the abolition of the rule in civil procedure. *This was an age of reform* in England and fairness to the accused was uppermost in the English mind. Thus, because of Bentham's arguments and the arguments of many of his followers, because of the fact that many American states had already made the accused a competent witness, but most of all, because this was an age of *reform*, the movement began in England to make the accused a competent witness.

In the face of this great public demand, the legislature realized that if it did make the accused a competent witness, other problems would arise. The first problem was the privilege against self-incrimination. If they made the accused competent and compellable, the privilege would be violated. If the accused was competent and exercised his privilege by not taking the stand an adverse inference would be formed by the jury. Thus, an adverse inference would be formed by the exercise of a traditional English right. Would the possibility of such an inference create a moral coercion on the accused to testify? If the accused did testify, did he waive his privilege? If so, to what extent did he waive his privilege? If the accused was made a competent witness should he also have the right to make an unsworn statement? Further, another problem was created by the dual capacity the accused would represent in testifying. On one hand, he would be a witness whose credibility could be attacked by evidence of his bad character. As the accused, however, the prosecution does not have the right to introduce evidence of his bad character on the grounds that such evidence would be prejudicial unless the accused has put his character in issue by introducing evidence of his good character. These were some of the problems facing the English legislature which they attempted to solve by the *Criminal Evidence Act, 1898* which (in so far as pertinent) provides:

1. Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows:

- a) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application:
  - b) The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of *any* comment by the prosecution:
  - c) The wife or husband of the person charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged:
  - d) Nothing in this Act shall make a husband compellable to disclose any communication to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage:
  - e) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged:
  - f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character unless—
    - (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or
    - (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establishing his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or
    - (iii) he has given evidence against any other person charged with the same offence:
  - g) Every person called as a witness in pursuance of this Act shall, unless otherwise ordered by the court, give his evidence from the witness box or other place from which the other witnesses give their evidence:
  - h) Nothing in this Act shall affect the provisions of section eighteen of the Indictable Offences Act, 1848, or any right of the person charged to make a statement without being sworn.
2. Where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution.
  3. In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply.

The act first of all provides that the accused is a competent witness. Further, he is a competent witness at "every stage of the proceedings." This has been interpreted to mean that the accused may give evidence under oath before a magistrate both in summary and indictable

offenses,<sup>206</sup> in extradition proceedings,<sup>207</sup> at the trial itself and after verdict in mitigation of punishment.<sup>208</sup> It has also been held that by virtue of this statute, a judge must inform the accused of his right to give evidence or make a statement.<sup>209</sup> However, in recognizing the privilege against self-incrimination, the legislature provided that the accused can only be called upon his *own* application so that he is not compellable.<sup>210</sup>

If the accused does choose to testify, he does so under sanction of oath and is therefore punishable for perjury.<sup>211</sup> By choosing to testify, the legislature also provided that the accused thereby waived his privilege against self-incrimination to the extent specified in the Act. Thus, upon cross-examination the accused may be asked any question even though it would incriminate him as to the offense charged.<sup>212</sup> If the accused refuses to answer upon cross-examination because it may incriminate him as to the offence charged, he may be punished for contempt, and whatever evidence he has given will not be received.<sup>213</sup> However, if the accused does choose to testify, he cannot be asked and if asked, does not have to answer any question that will show he has committed or has been convicted of any other offense or is of bad character.<sup>214</sup> In *Charnock v. Merchant*,<sup>215</sup> a conviction was quashed

<sup>206</sup> *R. v. Bird*, 19 Cox Cr. Cas. 180 (1898). The accused refused to give evidence at his trial but a statement he made during his preliminary hearing before a magistrate after caution was admitted. The privilege against self-incrimination was not involved since he had waived it by voluntarily giving testimony.

<sup>207</sup> *R. v. Kams*, as quoted in Taylor, op. cit. supra note 70, Vol. II, p. 864; Phipson, Evidence, p. 473 (London, 1956).

<sup>208</sup> *R. v. Wheeler*, [1917] 1 K.B. 283.

<sup>209</sup> "There is no doubt that the satisfactory course is that a prisoner's attention should be pointedly directed to his or her right to give evidence or make a statement." *R. v. Yeldham*, 128, L.T.R. 28, 30 (1923); *R. v. Village*, 20 Cr. App. Rep. 150 (1927); *R. v. Malvoici*, 73 J.P. 392 (1809).

<sup>210</sup> Since the Act provides that the accused can only be called for the defense, it was held that he could not testify before the grand jury in an early case. *Q. v. Rhodes*, [1898] 1 Q.B. 77. The wife or husband of the accused, as the case may be, is also competent but not compellable except upon application of the accused.

<sup>211</sup> *R. v. Wookey*, 63 J.P. 409 (1899). <sup>212</sup> Sec.1 (e).

<sup>213</sup> *R. v. Senior*, 34 L.J. 100 (1899); *R. v. Minihane*, 16 Cr. App. Rep. 38 (1921). Also see *R. v. Paul*, [1920] 2 K.B. 183, where a co-defendant pleaded guilty and was then cross-examined so as to incriminate his co-defendant. The theory of the court was the fact that he was called as a witness for the defense and thus subject to cross-examination.

<sup>214</sup> Sec. 1 (f).

<sup>215</sup> [1900] 1 Q.B. 474. "Whether a question put to a person charged with a crime and called as a witness tends to show, within the meaning of § 1, clause (f), of the Criminal Evidence Act, 1898, that he has committed or been convicted of or charged with any

because the accused had been asked upon cross-examination, over objection, if he had been previously convicted of a similar offense. Thus, as a general rule, the legislature provided that the accused only waives the privilege of self-incrimination to the extent of the particular offense charged. However, there are exceptions to this general rule. If proof of another offense will prove that the accused is guilty of the particular offense with which he is charged, it will be admitted into evidence under the theory of relevancy.<sup>216</sup>

In handling the question of the character of the accused, the legislature laid down the general rule that evidence of his bad character cannot be introduced upon cross-examination because such evidence would be prejudicial. As exceptions to this general rule, it was provided that if the accused gives evidence of his good character or asks questions of the witnesses for the prosecution with a view to establishing his own good character, the prosecution may attack his character upon cross-examination by asking about past offenses or his bad character upon the theory that the accused has put his character in issue.<sup>217</sup> Also, if the accused makes imputations as to the character of the prosecutor or witnesses for the prosecution, he is again subject to questions involving past offenses and bad character upon cross-examination.<sup>218</sup> Finally, if he has given evidence against another person charged with the same offense, he can be cross-examined as to past offenses or character.<sup>219</sup> Some of these rules have been severely criti-

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offense other than that with which he is charged cannot be decided by looking merely at the single question. Each question must be judged by the light of others asked before and after." *R. v. Ellis*, [1910] 2 K.B. 746. Also see *R. v. Haslam*, 12 Cr. App. Rep. 10 (1916) where a conviction was quashed because the prisoner had been placed in the dilemma of having to admit he had been in prison or commit perjury.

<sup>216</sup> Sec. 1 (f), (i). This is merely a reassertion of the common law rule as stated in *Makin v. Att. Gen. for N.S.W.*, [1894] A.C. 57, 65. "The mere fact that evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be relevant if it bears on the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defense which would be otherwise open to the accused." Also see, *R. v. Bell*, [1911] A.C. 47.

<sup>217</sup> Sec. 1, (f), (ii). *R. v. Winfield*, 27 Cr. App. Rep. 139 (1939); *Stirland v. Director of Public Prosecutions*, 30 Cr. App. Rep. 40 (1949).

<sup>218</sup> Sec. 1 (f), (ii). *R. v. Hudson*, [1912] 2 K.B. 464; *R. v. Morrison*, 6 Cr. App. Rep. 159 (1911); *R. v. Wilson*, 11 Cr. App. Rep. 251 (1915).

<sup>219</sup> Sec. 1 (f), (iii). *R. v. Hadwen*, [1902] 1 K.B. 882; *R. v. Seigley*, 6 Cr. App. Rep. 106 (1911). To avoid complications due to the refined study of case law, the rules as to cross-examination to credit of the accused have been simply stated as follows:

1. The accused in the witness-box may not be asked any question "tending to show that he has committed or been convicted of or been charged with any offense other

cized because of their unfairness to the accused. The prosecution may attack all his witnesses and counsel but if he makes any imputation as to the bad character of the prosecutor or his witnesses, he risks letting in his whole past record.

#### UNSWORN STATEMENTS

Before the *Criminal Evidence Act, 1898*, the accused had the right to make an unsworn statement. By Sec. 1 (h), this right was preserved in simple, straightforward, unexplanatory language. Since there was very little parliamentary debate on this provision and since the commentaries likewise gave it perfunctory treatment, some problems have arisen as to its application.<sup>220</sup> The most important problem is, why was the right to make an unsworn statement preserved? The legislature, in passing this Act, was attempting to establish a system whereby the accused would be able to give *evidence* under oath without interfering with his privilege against self-incrimination or his right to object to the introduction by the prosecution of any evidence of his bad character unless he had put his character in issue. How then, does the right to make an unsworn statement fit into this scheme?

Superficially, it would seem that once the accused was allowed to

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than that wherewith he is then charged, or is of bad character" unless one or the other of the three conditions set out in paragraph (f) of Section 1 of the Act of 1898 is fulfilled.

2. He may, however, be cross-examined as to any of the evidence he has given in chief, including statements as to his good record, with a view to testing his veracity or accuracy, or to showing that he is not to be believed on his oath.
3. An accused who "puts his character in issue" must be regarded as putting the whole of his past record in issue. He cannot assert his good conduct in certain respects without exposing himself to inquiry as to the rest of his record so far as this tends to disprove a claim for good character.
4. An accused is not to be regarded as depriving himself of the protection of the section, because proper conduct of his defense necessitates the making of injurious reflections on the prosecutor or his witnesses; *Turner*, 30 Cr. App. Rep. 9; [1944] K.B. 463.
5. It is no disproof of good character that a man has been suspected, or accused, of a previous crime. Such questions as "Were you suspected?" or "Were you accused?" are inadmissible because they are irrelevant to the issue of character, and can only be asked if the accused has sworn expressly to the contrary (see rule 2 above).
6. The fact that a question put to the accused is irrelevant is in itself no reason for quashing the conviction, though it should have been disallowed by the Judge. If the question is not only irrelevant but is unfair to the accused as being likely to distract the jury from considering the real issues, and so lead to "a miscarriage of justice" (*Criminal Appeal Act, 1907*, § 4 (1)), it should be disallowed and if not disallowed, is a ground on which an appeal against conviction may be based." *Stirland v. Director of Public Prosecutions*, 30 Cr. App. Rep. 40, 54, 55, (1944).

<sup>220</sup> See Cowen & Carter, *Legal Essays*, p. 205 (Oxford, 1956).

testify and give evidence under oath, the need for and reason for allowing unsworn statements has disappeared. Such was the position of a British judge in 1902 until his attention was called to the statutory reservation whereupon he allowed the unsworn statement to be made.<sup>221</sup> Canada gave the accused the right to testify under oath without any express reservation in regard to the right of the accused to make an unsworn statement. There, the right to make an unsworn statement has been held to be abrogated by the Act which gave the accused the right to testify under oath.<sup>222</sup> However, in England because of Sec. 1 (h) the right still survives and as such, presents many questions. Are such statements evidence? Can the accused make an unsworn statement and still call evidence? What time in the trial should such statements be made? Is an accused person represented by counsel entitled to make such a statement? Finally, it may be asked, what is an unsworn statement and why was the right to make one preserved by the *Criminal Evidence Act, 1898*? The most important of the above questions and the one upon which the other questions turn, concerns the probative value of the unsworn statements. Are they, or are they not, evidence?

In the 16th century the accused and counsel for the Crown grappled in furious verbal argument. The accused, in effect, gave unsworn evidence on his behalf and was examined on that evidence.<sup>223</sup> So long as the prisoner was not allowed counsel or witnesses he had to speak for himself. However, when the accused could call witnesses, they were at first not sworn and yet their evidence was considered. At the same time, the civil rule making parties incompetent was being

<sup>221</sup> "Now that the prisoner is entitled to give evidence on his own behalf under the Criminal Evidence Act, 1898, is not his right to make a statement gone?" *R. v. Pope*, 18 T.L.R. 717, 718 (1902).

<sup>222</sup> It is "extremely probable" that had it not been for the saving clause in the Imperial Evidence Act 1898, it would have been there held that the privilege of making an unsworn statement was abrogated by that Act. The privilege was granted to prisoners because they were debarred from giving evidence on oath and for that reason alone. When the law was changed and the right accorded to them to tell their story on oath as any other witness the reason for making the unsworn statement was removed. *R. v. Krafchenko*, 17 D.L.R. 244, 250 (1914). Also see *Kerr v. The Queen*, [1953] N.Z.L.R. 75, 78.

<sup>223</sup> Stephens, *op. cit. supra* note 30, Vol. I, p. 326; "his statements covered without distinction whatever he had to say of law, of evidence, and of argument. In effect, he furnished evidence, i.e. material which affected the jury's belief; but he was not sworn, he had no standing as a witness, and in theory of the law he therefore gave no evidence." Wigmore, *op. cit. supra* note 54, Vol. II, p. 684. "A prisoner's statements were not evidence because he could not be sworn." Holdsworth, *op. cit. supra* note 32, Vol. IX, p. 195.

adopted by criminal courts. The double effect of these two factors is represented by a case in 1681 wherein the judge said to the accused:

Make you your observations upon the proof, that is proper for you to do; and urge it as well as you can, and to the best purpose you can: But to tell us long stories of passages between you and others that are not a whit proved, that is not usual, nor pertinent.

In the same case, another judge said:

It is your part to sum up the evidence on your own side, and to answer that which is proved upon you, if you can. . . . But to tell stories to amuse the jury . . . and to run out into rambling discourses to no purpose, that is not to be allowed, nor ever was in any court of justice.<sup>224</sup>

This clearly indicates that what the accused said was not evidence. Since he was allowed witnesses, they proved his case along with other evidence. Why then was he allowed to speak? Simply because the prosecutor for the Crown was allowed to comment on the evidence and argue before the jury thus giving him an unfair advantage over the accused who had no counsel. In the interest of justice, the accused was allowed to comment or argue on the evidence. This viewpoint occurred again and again.<sup>225</sup>

When counsel was allowed to the accused, some judges logically held that when counsel had spoken, the accused could not because then counsel would argue or comment on the evidence and there was no need for the accused to make a statement.<sup>226</sup> Other judges, however,

<sup>224</sup> Colledge's Trial, 8 S.T. 550, 681 (1681).

<sup>225</sup> Coleman's Trial, 7 How. St. Tr. 1, p. 65 (1678), where the following dialogue took place:

COLEMAN: "I came home the last day of August."

JUDGE: "Have you any witness to prove that?"

COLEMAN: "I cannot say I have a witness."

JUDGE: "Then you say nothing."

This case was discussed in Cowen & Carter, *op. cit.* supra note 220, p. 210. Other examples are *R. v. Rider*, 8 C. & P. 539, 540 (1838), where it was said: "If the prisoner were allowed to make a statement, and stated as a fact anything which could not be proved by evidence, the jury should dismiss that statement from their minds; but if what the prisoner states is merely a comment on what is already in evidence, his counsel can do that much better than he can." Also of interest is the common law decision of the Supreme Judicial Court of Massachusetts where it was stated that: "[t]he statement or address of a defendant in the circumstances here disclosed is not evidence. It is merely a statement or address to be considered by the jury for what it is worth in the light of all the conditions under which it is given. No finding can be founded by the jury on the strength of such a statement, but every finding essential to the verdict must rest upon the evidence and testimony presented in the usual way and under customary safeguards as to competency and credibility." *Commonwealth v. Stewart*, 255 Mass. 9, 151 N.E. 74, 77 (1922).

<sup>226</sup> "Prisoner, your counsel has spoken for you. I cannot hear you both." *R. v. Boucher*, 8 C. & P. 141 (1837); *R. v. Burrows*, 2 M. & Rob. 124 (1838); *R. v. Rider*, 8 C. & P. 539 (1838).

were prepared to make concessions in favor of a prisoner and allowed him to make unsworn statements even though defended by counsel.<sup>227</sup> This became the regular practice. Cases also began to appear where the accused not only commented on the evidence but alleged new facts as well.<sup>228</sup> Why were these concessions made? First, many judges thought it unfair that the accused was not able to testify under oath and therefore not able to tell his story. It was also seen that it was impossible for a prisoner to address the jury without bringing in new matter and so many judges allowed it in.<sup>229</sup> Theoretically and historically, the proper purpose of the prisoner's address was comment and argument on the evidence. It was only laxity on the part of many judges due to the injustice of shutting the mouth of the accused that statements of new facts were allowed. This did not change the character of the prisoner's statements. They were not and are not evidence but only to be considered as an address or argument on the testimony and the whole case.<sup>230</sup>

The confusion arose because in cases like *R. v. Shimmis* it was stated:

True his statement was not made on oath, and that he was not liable to be cross-examined by the prosecuting counsel, and what he said was therefore not entitled to the same weight as sworn testimony. Still it was entitled to such consideration as the jury might think it deserved.<sup>231</sup>

Thus, today in the absence of a clear cut modern English decision, there are authorities who hold that unsworn statements are evidence and authorities who say they are not. In considering the problem, reference must be had to some New Zealand and Australian decisions.

The New Zealand Supreme Court has stated:

The statement thus permitted to be made must have some place in the body of material on which the jury are asked to decide whether the accused is guilty or not guilty—else why allow it at all? In cases where a statement is made the usual practice is for the presiding judge to point out to the jury that the state-

<sup>227</sup> *R. v. Malings*, 8 C. & P. 242 (1838); *R. v. Dyer*, 1 Cox Cr. Cas. 113 (1844). "I would never prevent a prisoner from making a statement though he has counsel"; *R. v. Shimmis*, 15 Cox Cr. Cas. 122 (1882).

<sup>228</sup> *R. v. Malings*, 8 C. & P. 242 (1838); *R. v. Walkling*, 8 C. & P. 243 (1838), wherein Baron Gurney expressing doubts as to this practice stated, "I think that it ought not to be drawn into a precedent."

<sup>229</sup> See 26 Austr. L.J. 166, 167 (1952); also see Best, op. cit. supra note 69, Par. 635.

<sup>230</sup> Wigmore, op. cit. supra note 54, Vol. II, p. 702.

<sup>231</sup> 15 Cox Cr. Cas. 122, 124 (1882). Also see *R. v. Beard*, 8 C. & P. 142 (1837) where it was stated that an unsworn statement, "is to have such weight with the jury as, all circumstances considered it is entitled to."



ment is not legal evidence because it has not been made under oath or subjected to the test of cross-examination, but that, having regard to the other materials before them, they may give it such weight as in the circumstances they consider it deserves.<sup>232</sup>

On the other hand, the Court of Criminal Appeal of Queensland after an elaborate survey of the authorities made this statement in *R. v. McKenna*:

[A]n unsworn statement by an accused person is not evidence. It should be accorded persuasive rather than probative force. The practice has grown up of allowing a prisoner to make statements of fact, but those statements are not evidence of the facts stated. Such statements of fact have come to be regarded as something less than evidence but something more than mere argument.<sup>233</sup>

One other viewpoint to be considered is that one proposed by the Supreme Court of New South Wales in *R. v. Riley*, which stated:

As a general rule, no material can be placed before a Court to establish a fact unless it is verified by oath. The Legislature may, however, if it chooses, depart from this general rule to any extent that it considers desirable. . . . The Legislature of New South Wales has thought fit to provide that an unsworn statement may be made by an accused person before the jury who are trying them. In our opinion, this must be regarded as "proof" in the sense of material to which the jury are entitled to give such weight as they think it deserves, for the purpose of determining whether the accused person has a lawful excuse within the meaning of the section. There is nothing in the section which states expressly or impliedly that proof may be given only by sworn statements.<sup>234</sup>

The fallacy of this reasoning lies in the fact that the Legislature have *preserved* the right to make an unsworn statement in Sec. 1 (h). This has in no way affected the status of an unsworn statement as

<sup>232</sup> *Perry v. Pledger*, [1920] N.Z.L.R. 21, 25. In Victoria, Australia, where the accused is statutorily allowed to make unsworn statements as to *facts*, this statement was made upon appeal to the High Court of Australia: "[T]he jury should take the prisoner's statement as *prima facie* a possible version of the facts and consider it with the sworn evidence, giving it such weight as it appears to be entitled to in comparison with the facts clearly established by evidence." *Peacock v. R.*, 13 Commonw. L.R. 619 (1911). Also see *Mack v. Murray*, 5 V.L.R. 416 (1879).

<sup>233</sup> 44 St. R. Qd. 299, 307 (1951). The trial judge who had given the instruction stating that an unsworn statement was not evidence was Mansfield, S.P.J. Also see *R. v. Morrison*, 10 L.R.N.S.W. 197 (1889) where an unsworn statement was held not to be evidence. It was stated that an unsworn statement should be regarded "in the same light as the speech of counsel. As a counsel can suggest upon the evidence what perhaps is the real state of facts, different from those deposed to by the witnesses for the Crown, so it is competent for a prisoner to make suggestions as to the real facts being different to those deposed to by the witnesses." Very curiously, *R. v. Chantler*, 12 L.R.N.S.W. 116 (1891), affirms the Morrison decision and then states that the prosecution may call evidence to rebut such a statement which seems incongruous if such statements are not evidence.

<sup>234</sup> 40 S.R.N.S.W. 111, 116 (1940).

evidence or not. Therefore, if unsworn statements were not evidence before the Act, they still are not evidence.

It is argued by Professor C. K. Allen<sup>235</sup> that unsworn statements are evidence. He cites *R. v. Maybrick* wherein Mrs. Maybrick, the accused, in making an unsworn statement blundered and thus "put the rope around her neck." He states that this was "evidence of the highest importance, though to the great disadvantage of the prisoner." Just because it was evidence against the accused, however, does not mean that unsworn statements are evidence for the accused.<sup>236</sup> Mrs. Maybrick's statement was an *admission* and hence an exception to the hearsay rule and thus evidence.

Professors Cowen and Carter<sup>237</sup> also argue that unsworn statements are evidence. Their chief argument is based upon the reasoning of the court in *R. v. Riley*, which has been exposed as fallacious. They further argue, "if the reason is that it is unsworn and untested, our statute law expressly recognizes that statements of fact may be evidence, although not given under oath."<sup>238</sup> Because an unsworn statement is not under sanction of oath and does not undergo the test of cross-examination, it would certainly not meet many definitions of evidence.<sup>239</sup> However, that is not pertinent because as has been shown, the whole theoretical and historical purpose of the unsworn statement has been to allow the accused a chance to argue his case in a "statement" to the jury. Certainly, during periods of laxity, the courts allowed the accused to introduce new facts into his "statement" which were not in evidence. These facts were not and are not evidence as some courts have mistakenly held in the most difficult problem of

<sup>235</sup> 69 Law Quarterly Review, p. 22 (1953).

<sup>236</sup> See Note *R. v. Shimmin*, 15 Cox. Cr. Cas. 122, 124 (1882) wherein a quotation from *R. v. Haines* is cited: "The prisoner's statement is evidence against him but not for him."

<sup>237</sup> Cowen and Carter, op. cit. supra note 220, p. 205.

<sup>238</sup> Cowen and Carter, *ibid.*, at p. 216. They then cite the Children and Young Persons' Act, (1933) which provides for the admission of unsworn evidence of children upon the entirely different theory that children would not understand the sanction of an oath. Also such evidence is subject to collaboration which distinguishes it again from an unsworn statement.

<sup>239</sup> Wigmore, op. cit. supra note 54, Vol. II, p. 684, rejects unsworn statements as evidence because they are neither sworn nor subject to cross-examination. So does Holdsworth, op. cit. supra note 32, Vol. IX, p. 195. Cowen and Carter, *ibid.*, at p. 216, define evidence as "that which may be placed before the Court in order that it may decide the issues of fact." Thus, they feel that unsworn statements are evidence. To become involved in the semantical problem of evidence would only serve to further confuse the issue.

trying to instruct the jury on how to regard these statements. They were and are the argument of the accused to the court and jury on his whole case. This answers the question posed in *Perry v. Pledger*, —“else why allow it at all?” The legislature in 1898 gave the accused the right to give *evidence* under oath. It preserved the right of making an unsworn statement so that every accused would have the right to argue his case to the jury.

Before the Act, there was some divergence as to when the accused should make his unsworn statement. Some courts held that he should address the jury before the speech by his counsel while others held that he should do so after the speech by his counsel. In *R. v. Sheriff*,<sup>240</sup> it was held that a prisoner's unsworn statement must be made before the counsel for the prosecution sums up the case and before his own counsel addresses the court. It is suggested that this is the proper ruling and the one to be followed.<sup>241</sup>

That the accused may make an unsworn statement despite the employment of counsel, seems to be quite settled.<sup>242</sup> However, in 1885 in *R. v. Millhouse*,<sup>243</sup> it was held that the accused could not make an unsworn statement if he had called witnesses. The court stated:

If it were allowed, the result would be that, after counsel had made a defence and called witnesses to facts, that then the prisoner, who was not liable to be cross-examined, could supplement what had been said by his counsel and witnesses, and supply facts by means of a statement made without the sanction of an oath, which it would be impossible to test by the ordinary means of cross-examination.<sup>244</sup>

However, in the famous case of *R. v. Maybrick*,<sup>245</sup> it appears that the accused, Mrs. Maybrick, was allowed to make an unsworn statement and call evidence. Other than this, there has been no clear decision in England.

This problem has been considered by the courts in Australia and

<sup>240</sup> 20 Cox. Cr. Cas. 334 (1903).

<sup>241</sup> Archbold, Pleading, Evidence & Practice in Criminal Cases, pp. 192, 193 (London, 1955). The New South Wales Crimes Act, Sec. 405 (1900) provides that the accused may make a statement at the close of the case for the prosecution and before calling of any of the witnesses for the defense.

<sup>242</sup> *R. v. Doherty*, 16 Cox Cr. Cas. 306 (1887); *R. v. Sheriff*, 20 Cox Cr. Cas. 334 (1903); *R. v. Pope*, 18 T.L.R. 717 (1902). The New South Wales Act and the Victorian Evidence Act both allow the accused to make an unsworn statement though he is represented by counsel.

<sup>243</sup> 15 Cox Cr. Cas. 622 (1885).

<sup>244</sup> *Ibid.*, at 623.

<sup>245</sup> Discussed in Cowen and Carter, *op. cit. supra* note 220, p. 208; Phipson, *op. cit. supra* note 207, p. 51. *Kerr v. the Queen*, [1953] N.Z.L.R. 75.

New Zealand. Three decisions in Queensland followed the reasoning of Lord Coleridge in *R. v. Millhouse* and disallowed the unsworn statement because they felt it would give an unfair advantage to the accused.<sup>246</sup> Then in *R. v. Harrold*<sup>247</sup> and *R. v. Mckenna*, supra, Mansfield, S.P.J. allowed the accused to call evidence and also make an unsworn statement. No comment was made upon this point when *R. v. Mckenna* went to the Court of Criminal Appeal. The important point to remember is that *R. v. Mckenna* is also the case that held that unsworn statements are not evidence. In the New Zealand case, *Kerr v. The Queen*,<sup>248</sup> the court discussed the *Millhouse* decision, the Queensland decisions and then considering the argument of Lord Coleridge in *Millhouse* stated:

It appears to us, however, that there is really no logical basis for refusing to allow an unsworn statement simply because evidence is called for the defence: and, indeed, the difficulty pointed out by Lord Coleridge can at least partly be met by requiring the prisoner to make his statement before evidence is called for the defence.

On the other hand, we cannot but feel that the interests of justice demand that the prisoner should have both rights concurrently. If an accused can prove through witnesses certain facts confirmatory or corroborative of the facts, or some of them, which he asserts in his statement, or can prove through witnesses facts to which his statement does not extend, it is difficult to conceive that he is not entitled in the interests of justice to establish those particular facts by the sworn testimony of others. It may be, of course, that his statement will extend to assertions of fact beyond the facts purported to be established by the testimony of his witnesses, but at least it seems to me he is entitled to reinforce his assertion as to as many facts as possible by the testimony of witnesses.

We think it necessary, however, to say that, in our opinion, the practice that should be adopted in cases in which a prisoner desires both to call witnesses and to make an unsworn statement is that the statement should be made before any evidence is called for the defence.<sup>249</sup>

This then overcomes the argument of the *Millhouse* case and leaves the way open for English courts to allow the accused to call witnesses and make an unsworn statement. But is the reasoning in *Millhouse* and this court sound? Reference must be made to the decisions of Mansfield in the *Mckenna* and *Harrold* cases. If unsworn statements are not evidence but merely argument on the case to the jury, then it certainly follows that the accused may call evidence. Nothing could be

<sup>246</sup> *R. v. Sturdy*, [1946] Q.W.N. 41; *R. v. Daniel*, [1946] Q.W.N. 42; *R. v. Toms*, [1947] Q.W.N. 66.

<sup>247</sup> [1948] Q.W.N. 36.

<sup>248</sup> [1953] N.Z.L.R. 75.

<sup>249</sup> *Ibid.*, at 78. Emphasis was also placed on the fact that Stephen, J. had allowed Mrs. Maybrick to make a statement and call evidence in *R. v. Maybrick*.

more logical. The time when the accused should make his statement, if it is argument to the jury, is after he has produced his evidence because this is what he must argue on. Therefore, if this theory is accepted, the reasoning of *Kerr v. The Queen* is incorrect.

It may be asked, what if the accused introduces new facts to which no reply is allowed to the prosecutor? The answer is simply that the trial judge and prosecutor should not allow him to introduce new facts. New facts were only permitted to be introduced into unsworn statements during the 19th century when the accused was incompetent and judges were lenient because of this. The *Criminal Evidence Act, 1898*, rectified this situation so that the accused may introduce all the new facts he wants by testifying under oath. Therefore, unsworn statements should be relegated to their former position as argument on the case. This places the address by the accused in the same category as counsel's address which makes the following resolution by English judges in 1881 pertinent:

In the opinion of the Judges it is contrary to the administration and practice of the criminal law as hitherto allowed that counsel for prisoners should state to the jury, as alleged existing facts, matters which they have been told on the authority of the prisoner but which they do not propose to prove in evidence.<sup>250</sup>

Therefore, if counsel in his address cannot allege facts which are not proved by evidence, the same rule should apply to the accused in making an unsworn statement.

It may be argued that the legislature intended that the accused should be allowed to give evidence under oath and also by an unsworn statement. This line of reasoning is supported by one case decided in 1882 when new facts were allowed to be introduced into unsworn statements through the leniency of judges because the accused was incompetent and judges had difficulty in instructing juries on how to regard these facts. Other arguments in favor of this theory have been shown to be incorrect. The great difficulties this theory will cause in regard to unsworn statements have been evidenced by the Australian and New Zealand cases. Such a theory is theoretically and historically unsound, and it should not be believed for one moment that the legislature intended to further confuse the problem by allowing the accused to give evidence under oath and also by an unsworn statement. It is far better to presume that the legislature gave the accused the right to present evidence, which includes new facts, under oath and

<sup>250</sup> Quoted in *R. v. Krafchenko*, 170 D.L.R. 244, 248 (1914).

by Sec. 1 (h), preserved the right of the accused to argue his case to the jury. Such reasoning simplifies the purpose of the *Criminal Evidence Act, 1898*, and solves many of the problems that now surround the unsworn statement.

#### THE SILENCE OF THE ACCUSED

*Silence at trial—comment by the judge.*—One of the problems facing the legislature in drafting the *Criminal Evidence Act, 1898*, was the effect of the privilege of self-incrimination. Clearly, they could not make the accused compellable because this would be a direct violation. But what if the accused exercised his privilege and did not choose to testify? Would not an adverse inference arise from the exercise of a traditional English right? Could the feared effect of such an inference act to coerce the accused into testifying? Recognizing the impossibility of stopping such an inference from arising in the jury per se, the legislature took steps to prevent the act of the accused in exercising his privilege against self-incrimination and choosing to remain silent from going beyond this and becoming ammunition in the hands of the prosecutor. Sec. 1 (b) provides:

The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution.

Though the Act specifically prohibits comment by the prosecution on the silence of the accused, it makes no mention of the judge's right to comment on this fact. This introduces a new problem. For a long time it had been a general rule that whenever a litigant in a civil case was peculiarly able to offer evidence which would elucidate the facts and failed to do so, an inference would arise that the production of such evidence was unfavorable to his cause and the judge would comment on this fact in many cases. As Lord Mansfield put it:

It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted.<sup>251</sup>

Further, the silence, speech or other conduct of the accused *outside* of the courtroom had long been admissible as evidence at his trial upon the theory that such conduct indicates the state of mind of the accused which is evidence.<sup>252</sup> Besides this, English judges had always been

<sup>251</sup> *Blatch v. Archer*, 1 Cowp. 64, 65, 98 Eng. Rep. 969, 970 (1774). Also see *Armory v. Delanerie*, 1 Strange 505 (1722); *R. v. Burdett*, 4 B. & Ald. 122 (1820).

<sup>252</sup> This theory is further developed subsequently in the American section on Silence of the Accused.

allowed to comment on the evidence and the manner in which the case was conducted. Therefore, it is logical to presume that the legislature purposely limited the prohibition to the prosecutor so as not to interfere with the above rules of evidence in regard to comment by the judge. When the question arose in late 1898, this was the answer presented in *R. v. Rhodes*,<sup>253</sup> where the court stated:

There is nothing in the Act that takes away or even purports to take away the right of the Court to comment on the evidence in the case and the manner in which the case has been conducted. The nature and degree of such comment must rest entirely in the discretion of the judge who tries the case; and it is impossible to lay down any rule as to the cases in which he ought or ought not to comment on the failure of the prisoner to give evidence, or as to what those comments should be. There are some cases in which it would be unwise to make any such comment at all; there are others in which it would be absolutely necessary in the interests of justice that such comments should be made. That is a question entirely for the discretion of the judge; and it is only necessary now to say that that discretion is in no way affected by the provisions of the Criminal Evidence Act, 1898.<sup>254</sup>

In 1904, this statement was made in *R. v. Corrie & Watson*:

I agree that no inference ought to be drawn in support of a weak case on the ground that the defendants were not called to give evidence; but where transactions are proved which are capable of an innocent explanation, and if the defendants could have given it, and there is *prima facie* evidence that the person is carrying on an illegal business, I do not think it improper for the jury to draw a conclusion from the fact that the defendants were not called.<sup>255</sup>

In *R. v. Bernard*, this statement was made:

It is right that juries should know, and, if necessary, be told, to draw their own conclusions from the absence of explanations by the prisoner. Here he failed to give any explanation of the circumstances in which he signed letters containing false statements. . . . There was abundant evidence of his guilt, and the jury were justified, in the absence of explanation by him, in convicting him.<sup>256</sup>

Further guidance is found in the opinions of certain cases in the Privy Council.<sup>257</sup> The most important of these cases is *Waugh v. The*

<sup>253</sup> [1899] 1 Q.B. 77.

<sup>254</sup> [1899] 1 Q.B. 77, 83, 84.

<sup>255</sup> Lord Alverstone, L.C.J. 68 J.P. 294, 297 (1904). Grantham J. said: "The jury have no right to convict a man merely because he does not go into the witness-box, but if *prima facie* evidence of an offense has been given and the man does not go into the box, the jury may draw their own conclusion."

<sup>256</sup> 1 Cr. App. Rep. 218, 219 (1908).

<sup>257</sup> In *Kops v. The Queen*, [1894] A.C. 650, 653, this statement was made: "The learned judges did not lay down—it was not within the scope of the case necessary to lay down—any general rule as to such comments. There may no doubt be cases in which it would not be expedient, or calculated to further the ends of justice, which undoubtedly regards the interests of the prisoner as much as the interests of the Crown, to call attention to the fact that the prisoner has not tendered himself as a witness, it being

*King*,<sup>258</sup> a murder case on appeal from the Court of Appeal, Jamaica, where the law in regard to comment is exactly the same as the law of England. One of the grounds of the appeal was the fact that the judge had, in his summing-up, referred no less than nine times to the fact that the accused had not testified. There it was stated:

It is true that it is a matter of fact for the judge's discretion whether he shall comment on the fact that a prisoner has not given evidence; but the very fact that the prosecution are not permitted to comment on that fact shows how careful a judge should be in making such comment.

Then after referring to the facts it was stated:

In such a state of the evidence the judge's repeated comments on the appellant's failure to give evidence may well have led the jury to think that no innocent man could have taken such a course. The question whether a prisoner is to be called as a witness in such circumstances and on a murder charge is always one of the greatest anxiety for the prisoner's legal advisers, but in the present case their Lordships think that the prisoner's counsel was fully justified in not calling the prisoner, and that the judge, if he made any comment at all, ought at least to have pointed out to the jury that the prisoner was not bound to give evidence and that it was for the prosecution to make out the case beyond reasonable doubt.<sup>259</sup>

In *R. v. Jackson*,<sup>260</sup> an appeal from a conviction for receiving stolen property, the *Waugh* case was distinguished as being a murder charge:

In that case there was a conviction of murder, and I do not want in the least to appear to be whittling down what their Lordships in the Judicial Committee said on this matter, but, of course, each case on such a point as this must depend on its own facts. . . . It has to be remembered, among other things, in this case that the charge against the appellant was receiving stolen property, and if ever there is a case in which a prisoner might be expected to give evidence offering an explanation with regard to the offence of which he is alleged to be guilty, that is the case. We cannot say that because the judge commented strongly on the appellant's absence from the box that the comment was in any way unfair. Of course, a prisoner is always entitled to say: "I am going to stand here and say nothing. The evidence against me is so unsatisfactory that it does not call for any answer"; but nowadays, whatever may have been the position very soon after the Criminal Evidence Act, 1898, came into operation—and I regret to say that I have been in the profession long enough to remember the state of affairs when counsel had very great difficulty in deciding whether to call his client or not—everybody now knows that absence from the witness-box requires a very considerable amount of explanation; I need not put it higher than that. In view of the evidence in this case, if the appellant had any explanation to give, one cannot doubt that he would have given it.<sup>261</sup>

open to him either to tender himself, or not, as he pleases. But on the other hand there are cases in which it appears to their Lordships that such comments may be both legitimate and necessary."

<sup>258</sup> [1950] A.C. 203.

<sup>259</sup> [1950] A.C. 203, 211, 212.

<sup>260</sup> 37 Cr. App. Rep. 43 (1953).

<sup>261</sup> 37 Cr. App. Rep. 43, 50, 51 (1953).



Recently in *R. v. Adams*,<sup>262</sup> Devlin, J., in his summing-up made the point that it was a natural reaction to ask why the accused had not gone into the witness-box and say: "If he is an innocent man . . . he can tell us more about this than anyone else can. Why has he not gone into the witness-box unless he thinks that questions may be put to him that he could not satisfactorily answer?" He further said that the jury might have found defense counsel's reasons for the accused not giving evidence convincing, or they might not, but it did not matter. The accused had the right not to go into the witness-box. It would be utterly wrong if they were to regard his silence as contributing in any way to proof of guilt. It did not and could not.

Theoretically, the true interpretation of Sec. 1 (b) has been pointed out. Comment by the prosecution is prohibited because in his hands it would become not only an inference but a weapon with which he could place the accused in a frightening dilemma. It would act as a coercion on the accused to take the stand for fear of being convicted because he has exercised his privilege against self-incrimination, a traditional English right. It must therefore be presumed that the judge should not be able to use the silence of the accused as such a weapon. It must be remembered by the trial judge that the privilege against self-incrimination stands as a guardian over any comment he might make on the silence of the accused. Therefore, no comment should be made merely because the accused is silent. The silence of the accused must be such that would naturally raise an inference of guilt because it is peculiarly in his power to elucidate or explain the *prima facie* case against him. Therefore, it is suggested that the strong language of Lord Goddard in *R. v. Jackson*, should be regarded with caution and that the trend towards a broad discretion on the part of the judge in commenting on the silence of the accused at trial should be checked in keeping with the reasoning of Devlin, J. in the *Adams* case.

*Silence before examining magistrate—comment at trial.*—Since the *Criminal Evidence Act, 1898*, makes the accused a competent witness at "every stage of the proceedings," he is a competent witness when appearing before the examining magistrates. It is provided by statute, that the magistrate shall caution the accused and tell him that he need not say anything unless he wishes to do so.<sup>263</sup> Further, the accused is

<sup>262</sup> Unreported. Quoted from the *Law Times*, Vol. 224, p. 170 (Sept. 1957).

<sup>263</sup> The right and opportunity of the accused to make a statement before the examining magistrate after caution is found in the *Magistrates' Courts Rules*, r. 5 (4) 1952, Archbold, op. cit. supra note 241, p. 402.

protected by the *Criminal Evidence Act, 1898*, which prohibits comment by the prosecution if he exercises his privilege of self-incrimination as recognized by the Act. However, because the accused is competent when appearing before the magistrates, the question arose as to whether the trial judge might comment on the fact that the accused did not make a statement or give evidence after the caution by the magistrate. Again it is clearly seen that mere silence should not be the subject of comment because of the privilege against self-incrimination and also the Magistrates' Rules which provide that the accused need not say anything unless he wishes. Since the appearance of the accused before the magistrate is not his trial, should his failure at this time to introduce evidence which would elucidate or explain the facts against him result in an adverse inference which the judge might comment upon at the trial? Should his silence be admissible into evidence as indicating his state of mind or as it is sometimes known, the "consciousness of guilt" rule? In his summing-up should the judge be allowed to mention this fact at all by way of comment on the evidence or the handling of the case?

The first indication that a judge might refer to this silence in any respect was seen in *R. v. Humphries*, where it was stated:

The recent Criminal Evidence Act was passed for the benefit of prisoners, and if the defence was an honest one it should be given at the earliest possible stage, and justices should impress that on all prisoners.<sup>264</sup>

This argument was used by counsel for the Crown in *R. v. Naylor*<sup>265</sup> as justification for the summing-up of the recorder at Quarter Sessions. In this case, after caution,<sup>266</sup> the accused had answered, "I don't wish to say anything except that I am innocent." The fact that the accused had not disclosed his defense at this time was sought to be used as *evidence* against him in corroboration of an alleged accomplice who had pleaded guilty and given evidence for the prosecution. In other words an attempt was made to treat his silence as incriminating evidence. The recorder, in his summing-up, had referred to the caution and the response of the accused as follows:

Imagine a purely innocent man accused of housebreaking and having these words put to him—"Do you wish to say anything in answer to the charge?"

<sup>264</sup> 67 J.P. 396 (1903).

<sup>265</sup> [1933] 1 K.B. 685; 23 Cr. App. Rep. 177 (1932).

<sup>266</sup> The words of caution used were: "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence at the trial."

Surely, if he is innocent, one would think he would give some explanation of where he was and what he was doing at the particular time, and would make his defence then and there. . . . Of course, what lurks in the background of this sort of hanging back and not disclosing his defence is that he gives the prosecution and the police no time to inquire into any statement he may make, so that it might be possible to show that these statements are not true. That is the real reason why many men do not make statements when they are first called upon to do so.<sup>267</sup>

In holding this a misdirection and quashing the conviction, the Court of Criminal Appeal said:

When one looks at the words of the caution in s.12 sub-s.2, of the Criminal Justice Act, 1925, which must be taken to have been framed deliberately, it is obvious that they were intended to convey to the prisoner the information that he is not obliged to say anything unless he desires to do so. We do not think that the words of the caution can properly be construed in the sense that the prisoner remains silent after being cautioned at his peril and may find his silence made a strong point against him at his trial. In our view, the words mean what they say, and a prisoner is entitled to reply to the caution that he does not wish to say anything. The matter becomes even stronger when one reflects that what was done here was done on the advice of a solicitor. It would be strange if a point could properly be made against a prisoner because, acting on the advice of his solicitor and following the very words of the Act of Parliament, he says that he does not desire to say anything at that stage.<sup>268</sup>

However, this case was distinguished in *R. v. Littleboy*<sup>269</sup> where the Court of Criminal Appeal held that no general proposition in regard to comment had been laid down in the *Naylor* case. The trial judge, in the course of his summing-up, referred to the defense of alibi and then observed that it was unfortunate that the prisoner did not say then and there—that is to say, when charged and when asked by the magistrates before being committed for trial if he desired to give evidence on his own behalf or to call witnesses. He then said:

If he says it then and there, it gives the police, or those who are conducting the prosecution an opportunity of making their own inquiries to test the truth of the statement that he was at Wroxham on that afternoon, at the material time, on June 29. By adopting the course of saying "I reserve my defence" of course, he deprives the prosecution of any opportunity of testing the statement.<sup>270</sup>

<sup>267</sup> [1933] 1 K.B. 685, 686; 23 Cr. App. Rep. 177, 180 (1932).

<sup>268</sup> [1933] 1 K.B. 685, 687; 23 Cr. App. Rep. 177, 180, 181 (1932). In *R. v. Smith*, 25 Cr. App. Rep. 119 (1933), a reference was made in the summing-up that the two defendants had made no statement before the magistrate. This was held to be a misdirection since each had given his answer to the police, each had been represented in court and was entitled to say nothing.

<sup>269</sup> [1934] 2 K.B. 408. This decision and *R. v. Naylor* were both by Lord Hewart, C. J.

<sup>270</sup> [1934] 2 K.B. 408, 411.

In other words, the fact that a statement was not made before the magistrates was not treated as *evidence* against the accused, which was the case in *Naylor*, but rather was used by way of *observation* on the defense of alibi which was set up at the trial. The court thus distinguished this case from *Naylor* and stated:

It is one thing to make an observation with regard to the force of an alibi, and to say that it is unfortunate that the defence was not set up at an earlier date so as to afford the opportunity of its being tested; it is another thing to employ that non-disclosure as evidence against an accused person and as corroborating the evidence of an accomplice.<sup>271</sup>

The court stated that it was not trying to lay down any general propositions since this would not be useful but held that the *observations* of the trial judge were not a misdirection. They then said:

No doubt observations upon the failure to disclose a defence at some date earlier than the trial have to be made with care and fairness to the accused person in all circumstances in the case, but we do not assent to the general proposition that in no circumstances may comment be made on the failure to disclose the defence in the police court. The observations of the Court in *Rex v. Naylor* were never intended to go that length.<sup>272</sup>

From these cases it can be seen that the silence of the accused before an examining magistrate cannot be construed as evidence against him because of his failure to deny, elucidate or explain incriminating facts or under the "consciousness of guilt" doctrine. This is due in part to the privilege of self-incrimination and the *Criminal Evidence Act, 1898*, but more so, from the reasoning of the *Naylor* case, to the fact that the *Magistrates' Rules* provide that the accused does not have to reply to a caution unless he so desires. However, the Act, the privilege

<sup>271</sup> Ibid., at 413.

<sup>272</sup> Ibid., at 414. A defense of alibi has always been regarded as one of which an early disclosure is desirable. "Before the magistrates the appellant had set up no defense, and in this class of case it was most important that the defense should be raised at the earliest opportunity." *R. v. Winkworth*, 1 Cr. App. Rep. 129, 130 (1908); "He had, at the police court, a full opportunity of saying where he was. It is very unfortunate that he kept back this alibi until the trial." In *R. v. Parker* [1933] 1 K.B. 850, there were 3 defendants, two of whom gave evidence and disclosed their defenses. The third reserved his defense. The trial judge, in summing-up had said: "Now you will remember that this alibi, unlike those of the other two, was never disclosed when he was at the police court, and when he was there asked if he would give evidence or call any witnesses, he contented himself by saying that he would reserve them until the trial, and so in that way the police had no opportunity of making any inquiries into the truth of the evidence given by those witnesses."

The Court held that this was not a misdirection and distinguished this case from *R. v. Naylor* by indicating that here there were 3 separate defendants and that the judge was bound in the interests of the two defendants who had declared their defenses to make this known to the jury.

and the *Magistrates' Rules* have no effect on the right of the judge to comment on the evidence and the handling of the case and so he may make *observations* on the silence of the accused indirectly when directing the jury on how to weigh an alibi which the accused could have invoked earlier. Thus, theoretically the judge is not commenting on the silence of the accused but merely commenting on the weight of his alibi as evidence.

*Silence before the police—comment at trial.*—The Judges' Rules provide that the police should caution the accused if he has, or is going to charge him with an offense and also warn him that he need not say anything unless he so desires.<sup>273</sup> The *Criminal Evidence Act, 1898*, does not extend to these proceedings and so the accused is not competent nor entitled to its protection. He does have the protection of the privilege against self-incrimination and also of the Judges' Rules. Can the silence of the accused after caution by the police act as evidence under the "consciousness of guilt" doctrine so that the judge may comment on this fact? Can the judge comment on the failure of the accused to deny, elucidate or explain incriminating evidence at this point? May he make any comment at all about this fact in his summing-up?

In *R. v. Leckey*,<sup>274</sup> the accused had replied to a police caution during an interview by saying: "I have nothing to say until I have seen someone, a solicitor." The trial judge in summing-up, commented adversely on three occasions in regard to the silence of the accused and suggested that the jury might infer the guilt of the accused from this silence. The Court of Criminal Appeal stated:

In our view, that amounted to a misdirection, and it is proper ground on which this conviction should be quashed. If it were not so, a caution might obviously be a trap instead of the means for finding out the truth in the interests of justice. An innocent person might well, either from excessive caution or for some other reason, decline to say anything when charged and cautioned, and, if that could be held out to a jury as ground on which they might find him guilty, he might obviously be in great peril.<sup>275</sup>

In *R. v. Tune*,<sup>276</sup> the accused, on being interviewed by the police after caution with regard to 3 charges, made a statement in which he admitted that he had been shown various documents by the police, but gave no explanation and at the end said: "I can fully explain the whole

<sup>273</sup> See Archbold, *op. cit.* supra note 241, p. 414.

<sup>274</sup> [1944] 1 K.B. 80.

<sup>275</sup> *Ibid.*, at 86.

<sup>276</sup> 29 Cr. App. Rep. 162 (1944).

question, but would prefer to have advice before doing so in writing." The judge referred to that statement in his summing-up and made the following comment: "Members of the jury, could not that have been said without legal advice?"

The Court of Criminal Appeal held that this was not a misdirection because it did not invite the jury to form an adverse conclusion from the fact that the accused did not give an explanation. They felt that it was merely a comment that what the accused was saying, if it was true, was something that did not require any legal advice.

In *R. v. Gerrard*, the accused being found in possession of a lorry laden with bottles of spirits, was asked by the police officer, after caution, how he came to be in possession of the lorry and the contents. The accused replied: "What I have to say I will say to the court." Later, upon trial for housebreaking, the judge in summing-up said:

It may be a little odd to you—I do not know—that he should say: "I reserve my statement for the court," when in fact, he has not been charged with anything or told he is going to come before a court.<sup>277</sup>

The Court of Criminal Appeal held that this was not a misdirection and stated:

It can only be a misdirection if it was an invitation to the jury to form an adverse opinion against the applicant because he did not then give an explanation, but, in our opinion, it cannot possibly be construed as anything of the sort. It was a perfectly harmless, reasonable and true observation to make.

They then put forth this warning about *Leckey's* case:

All we say about *Leckey's* case, which was a decision of this court, is that it may be described as forming the high water mark of those cases in which convictions have been quashed because of a statement made by the presiding judge about an observation made by the accused man when he was arrested, and we are not disposed to extend the decision in that case beyond the facts of that case or some similar case, if it should come before us.<sup>278</sup>

From these decisions it can be seen that the silence of the accused after caution by the police cannot act as evidence under the "consciousness of guilt" doctrine or under the theory that the accused did not elucidate or explain incriminating facts which it was in his power to do, thus justifying an adverse inference which acts as an admission. The reason is clearly the *Judges' Rules* which provide that the accused should be cautioned that he need not say anything unless he so desires. This recognition of the privilege against self-incrimination in the *Judges' Rules* and the *Magistrates' Rules* has thus offset these two

<sup>277</sup> 1 All. E. R. 205 (1948).

<sup>278</sup> 1 All E. R. 205, 206 (1948).

former rules of evidence in regard to the silence of the accused before the magistrate or the police. However, the courts have held that the judge may make an *observation* on the silence of the accused in his summing-up as long as it is "harmless" and "reasonable" and does not invite the jury to "form an adverse opinion." In regard to how far judges may carry these observations, it may be well to bear in mind the concluding remark by the court in *R. v. Tune*:

It is probably better, where a person has been charged with a criminal offence after having been cautioned and has either made no answer at all, or has made some observations, which in itself is not in the nature of an explanation of the charge, that the presiding judge should say nothing about it beyond telling the jury exactly what was said or not said on that occasion, because many observations of different sorts by learned judges have from time to time been made the subject of appeals to this court. If nothing is said by way of comment by the presiding judge, no point can be raised.<sup>279</sup>

#### CONFESSIONS

*Judicial confessions.*—If in open court, the accused freely and voluntarily confesses that he is guilty of the offense charged in the indictment, it acts as a plea of guilty and if the court accepts the plea, further proof or trial is unnecessary. However, once the accused has been given in charge to the jury, the verdict of the jury is taken, even though the accused confesses during the course of the proceedings.<sup>280</sup> The court is usually reluctant to accept and record a confession of guilt on indictments for grave crimes and will generally advise the prisoner to retract it and plead not guilty.<sup>281</sup>

If the accused confesses before a magistrate upon preliminary inquiry it is treated as an admission which may be used in evidence at the trial of the accused.<sup>282</sup> The taking of such confessions is governed by

<sup>279</sup> 29 Cr. App. Rep. 162, 165 (1944).

<sup>280</sup> *R. v. Hencock*, 23 Cr. App. Rep. 16 (1931).

<sup>281</sup> Archbold, *op. cit.* supra note 241, p. 420.

<sup>282</sup> At common law when the accused appears before the magistrate he was not examined under oath because he was incompetent. Thus, if it happened that he was examined under oath, any confession resulting therefrom was excluded from evidence. The proceedings of such examination were regulated for some years by the statute 1 & 2 P. & M. c. 13, § 4 (1554), which provided that justices of the peace should examine the accused before committing him or allowing him to bail. If the accused confessed during these proceedings such confession was readily admitted into evidence under the common law and under the statute. In 1917, *R. v. Wilson*, 171 Eng. Rep. 353, put forth the proposition that an examination by a magistrate imposes an obligation to speak so that a confession would not be voluntary and hence excludable. This doctrine was revived in 1850 when in *R. v. Pettit*, 4 Cox. Cr. Cas. 164, 165, it was stated that "magistrates have no right to put questions to a prisoner with reference to any matters having a bearing on the charge upon which he is brought before them." This view has received little sanction.

the *Magistrates' Courts Rules* which provide that after the evidence of the prosecution has been heard and the charge read and explained to the accused, the court shall say to the accused in these words or words to this effect:

You will have an opportunity to give evidence on oath before us and to call witnesses. But first I'm going to ask you whether you wish to say anything in answer to the charge. You need not say anything unless you wish to do so, and you have nothing to hope from any promise, and nothing to fear from any threat, that may have been held out to induce you to make any admission or confession of guilt. Anything you say will be taken down and may be given in evidence at your trial. Do you wish to say anything in answer to the charge?<sup>283</sup>

Whatever the accused says in answer to the charge is put in writing, read over by him and signed by one of the examining justices and also by the accused if he so wishes. Any statement made by the accused in accordance with the rules may, whether signed by the accused or not, be given in evidence on his trial without further proof.<sup>284</sup>

The important thing to be remembered in confessions before a magistrate is the theory of their admissibility. First, the confession may be admissible into evidence by virtue of the statute if proper caution is given. The confession may not be admissible under the statute if proper caution was not given but it may be admissible under the common law if the confession is deemed "trustworthy" by one of the tests previously discussed. Finally, if the confession is in response to questions by the magistrate the problem arises as to whether it is admissible under the statute or under common law or neither. If, after caution, such a confession would be admissible under the statute has not been authoritatively decided. At common law, a confession after questioning by a judge, was admissible except for some individual rulings which held that the putting of questions was improper in that it involves a compulsion and that therefore, the confession was not "voluntary."<sup>285</sup> This view has received little sanction. If the accused chooses to testify under oath, anything he says will be put in evidence because by the *Criminal Evidence Act, 1898*, he is a competent witness before the magistrates.

<sup>283</sup> *Magistrates' Courts Rules* r. 5 (4) (1952) as set out in Archbold, *op. cit.* supra note 241, p. 402.

<sup>284</sup> Archbold, *ibid.*, at pp. 403, 404. In *R. v. Sansome*, 4 Cox Cr. Cas. 203, 207 (1850) it was pointed out that a confession not receivable under the 1849 statute for lack of a caution could still be received under the common law because it met the test for trustworthiness. It also seems that no further proof of a caution having been given is required than the fact of it appearing to have been so given on the face of the prisoner's statement. Also see *Lambe's Case*, 2 Leach Cr. L. 625 (3rd Ed., 1791).

<sup>285</sup> *R. v. Wilson*, 171 Eng. Rep. 353 (1817); *R. v. Pettit*, 4 Cox Cr. Cas. 164 (1850).



Since judicial confessions take place in court before impartial judges, there is usually very little trouble involved in receiving them. The main problems occur with extra-judicial confessions.

*Extra-judicial confessions.*—An extra-judicial confession is made where the accused makes a confession of his guilt to any person other than a judge or magistrate seised of the charge against him. The fundamental theory underlying their admissibility is, as has been noted, their trustworthiness. To this end, various tests have been employed throughout English history.<sup>286</sup> Archbold states: "The only questions to be considered in deciding whether a confession is or is not admissible are: (1) Was any promise of favor, or any menace or undue terror made use of, to induce the prisoner to confess? (2) If so, was the prisoner induced by such promise or menace, etc., to make the confession sought to be given in evidence? If the answer to both these questions be in the affirmative, the confession will be inadmissible."<sup>287</sup>

To exclude a confession, it must be made to someone in authority, that is, someone engaged in the arrest, detention, examination or prosecution of the accused.<sup>288</sup> The inducement itself in order to exclude a confession must relate to the charge. The inducement must reasonably imply that the accused's position in regard to the charge will become better or worse depending on whether he confesses or not. This inducement does not have to be express but may be implied from the conduct of the person in authority or the circumstances of the case. This inducement does not have to be made directly to the accused for the confession will be excluded if it can be reasonably presumed that it came to his knowledge and induced the confession.<sup>289</sup> The great majority of extra-judicial confessions are those made to the police.

If the accused confesses while detained or arrested by the police, the question arises whether to exclude this confession from evidence be-

<sup>286</sup> These tests, discussed previously, were: Was the person placed in such a position that an untrue confession of guilt irrespective of its truth or falsity has become the more desirable of two alternatives between which the person is obliged to choose; Was the confession induced by a threat or promise, a fear or hope; Was the confession "voluntary" in conjunction with the "threats and promises" test; Was the confession "voluntary" as an absolute test.

<sup>287</sup> Archbold, *op. cit. supra* note 241, p. 413; Phipson, *op. cit. supra* note 207, p. 266; Taylor, *op. cit. supra* note 70, Vol. I, p. 548. Most English authorities and cases use the "voluntary" test coupled with the "threats or promises" test.

<sup>288</sup> Phipson, *ibid.*, at p. 267; Taylor, *ibid.*, at Vol. I, p. 551; Archbold, *ibid.*, at pp. 409, 410.

<sup>289</sup> For various examples of inducements see: Phipson, *ibid.*, at pp. 268-270; Taylor, *ibid.*, at Vol. I, pp. 554-557; Archbold, *ibid.*, at pp. 411-413. The burden of proof is on the prosecution to show the confession is trustworthy. Phipson, *ibid.*, at p. 266.

cause it is untrustworthy. For a long time, the mere fact of arrest even when combined with interrogation did not act to exclude a confession.<sup>290</sup> This result was quite in keeping with the tests employed at this time to determine the untrustworthiness of a confession since no threats or promises were employed and there was no alternative of a false confession to choose from. No caution to the prisoner was required at this time either.

In the middle of the 19th century when confessions were excluded on trivial and irrational grounds, the test of "voluntariness" as an absolute and final test was well accepted. Therefore, if the accused confessed while in custody in answer to questions put to him, the confession was excluded because it was not "voluntary."<sup>291</sup>

Wigmore points out that the effect of these rulings plus the statute requiring the magistrate to caution the accused resulted in a change of police tradition. He attributes this to the dominance of a tendency in English law to apply to the situation "the dictates of that sporting instinct which has done so much in other parts of English law to establish principles of fair and considerate treatment of the accused."<sup>292</sup> In 1912, the judges in England at the request of the Home Secretary drew up four rules as guides for police officers in respect to communication with prisoners or persons suspected of crime.<sup>293</sup> These rules did not have the force of law but were merely administrative directions which police authorities were to enforce upon their subordinates as tending to the fair administration of justice. In *R. v. Voisin*<sup>294</sup> it was held that statements obtained from prisoners *contrary to the spirit of these rules*, could be rejected as evidence by the judge presiding at the trial.

<sup>290</sup> *Lambe's Case*, 2 Leach Cr. C. 3rd ed., p. 625 (1791); *R. v. Wild*, 1 Mood. C. C. 452 (1835).

<sup>291</sup> The first decisions following this line of reasoning were a series of Irish cases quoted in Wigmore, *op. cit. supra* note 54, Vol. III, p. 292. Another factor involved was the passage of the statute 11 & 12 Vict. c. 42, Art. 18 which provided for two cautions to be given to a prisoner when being examined by a magistrate. This concern for the prisoner when appearing before a magistrate had a great influence on the conduct of police investigations. The attitude is well illustrated in the following passage: "When a prisoner is in custody, the police have no right to ask him questions. Reading a statement over, and then saying to him, 'What have you to say?' is cross-examining the prisoner, and therefore I shut it out. A prisoner's mouth is closed after he is once given in charge, and he ought not to be asked anything." *R. v. Gavin*, 15 Cox Cr. Cas. 656, 657 (1885).

<sup>292</sup> Wigmore, *op. cit. supra* note 54, Vol. III, p. 293.

<sup>293</sup> The rules are set out in *R. v. Voisin*, [1918] 1 K.B. 531, 539.

<sup>294</sup> *Ibid.*

Today, the judges' rules provide as follows:

1. When a police officer is endeavoring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained.
2. Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking him any questions, or any further questions, as the case may be.
3. Persons in custody should not be questioned without the usual caution being first administered.
4. If the prisoner wishes to volunteer any statement, the usual caution should be administered. It is desirable that the last two words of such caution should be omitted, and that the caution should end with the words "be given in evidence."
5. The caution to be administered to a prisoner, when he is formally charged, should therefore be in the following words: "*Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence.*" Care should be taken to avoid any suggestion that his answer can only be used in evidence *against* him, as this may prevent an innocent person making a statement which might assist to clear him of the charge.
6. A statement made by a prisoner before there is time to caution him is not rendered inadmissible in evidence merely by reason of no caution having been given, but in such a case he should be cautioned as soon as possible.
7. A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.
8. When two or more persons are charged with the same offence and statements are taken separately from the persons charged, the police should not read these statements to the other persons charged, but each of such persons should be furnished by the police with a copy of such statements and nothing should be said or done by the police to invite a reply. If the person charged desires to make a statement in reply, the usual caution should be administered.
9. Any statement made in accordance with the above rules should, whenever possible, be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish.<sup>295</sup>

In as much as these are not rules of law, but only rules for guidance of the police, the fact that a prisoner's statement is made by him in

<sup>295</sup> Archbold, op. cit. supra note 241, pp. 414, 415. Also see Moriarty, *Police Procedure*, pp. 86, 87 (1957); Moriarty, *Police Law*, pp. 65-68 (1955). Bunn, *Police Procedure*, pp. 31-35 (1957), includes the supplementary rules which provide that: The accused should write the statement out himself if possible; the police officer should also note the times of taking the statement in his notebook; once a person has been invited to make a statement and declined, no further invitation should be given him unless new material is found.

reply to a question by the police after he has been taken into custody and without a caution does not *of itself* render the statement inadmissible into evidence.<sup>296</sup> However, "in its discretion the court can always refuse to admit it if the court thinks there has been a breach of the rules."<sup>297</sup> As to the exercise of this discretion by a trial judge it has been said in *R. v. Bass*:

There can be no doubt, having regard to that evidence, that the appellant was in custody; that he was questioned without being cautioned, and thus that there was a breach of rule 3 of the Judges' Rules. If the Deputy-Chairman had held—as we think he should have done—that the statement was taken in contravention of the Judges' Rules, it would have been open to him in his discretion to refuse to admit it. On this matter he did not exercise any discretion because, erroneously as we think, he considered the Rules had not been contravened.<sup>298</sup>

Therefore, in considering confessions made to the police, the judge must determine if the *Judges' Rules* have been violated. If they have been violated and he does not so state, he has violated his discretion if he lets in the confession and a conviction will be quashed. If he holds they have been violated, he may in his discretion either allow the confession in or exclude it from evidence. He may exclude the confession by virtue of the fact that it does not meet the test for trustworthiness or he may exclude it because the *Judges' Rules* have been contravened. If he allows the confession into evidence, the fact that the *Judges' Rules* have been violated will not justify a quashing of the conviction because he has exercised his discretion. But, the Criminal Appeal Court may still quash the conviction because the confession was not free and voluntary and was induced by a promise of favor, or by menaces or undue terror and therefore, untrustworthy.

Thus, from a theory of evidence that untrustworthy confessions should be excluded from evidence and from a period of reform in English criminal history when fairness to the accused was of the utmost importance there has evolved a method of police control and police measures which ensures to the accused a high degree of protection when charged by the police. The trend in England as witnessed by the above cases, is to increase that protection indirectly by forcing the police to comply more strictly with the *Judges' Rules*.

<sup>296</sup> *R. v. Voisin*, [1918] 1 K.B. 531; *R. v. Wattam*, 36 Cr. App. Rep. 72 (1952); See Archbold, *ibid.*, pp. 416, 417.

<sup>297</sup> *R. v. May*, 36 Cr. App. Rep. 91, 93 (1952).

<sup>298</sup> 37 Cr. App. Rep. 51, 56 (1953).

## SOME GENERAL OBSERVATIONS

Anglo-American observers tend to look upon many features of French criminal procedure with mixed reactions of skepticism, distaste and astonishment. Though the basic differences lie in the philosophy and historical development of the Anglo-American and French systems which have installed a strong sense of traditionalism in the peoples of each country to their own principles, the following features of French criminal procedure have appeared particularly incredible to jurists of the United Kingdom and America:

1. To jurists whose systems have evolved principles of evidence which require volumes to expound and which confuse even the most ardent of scholars, the French system of evidence which basically is concerned with the "personal conviction" of judge and jury cannot be regarded as essentially scientific;
2. The interrogation of the accused by every manner of official from the moment he has become a suspect until the moment of his trial is no doubt one of the most villainous practices of French criminal procedure to many Anglo-American jurists;
3. The *enquête officieuse* by the *police judiciaire* appears to be a legislative sanction of "third degree" tactics;
4. The fact that the *juge d'instructions* makes his own investigation and conducts his own interrogations of the accused in the counterpart of the Anglo-American preliminary hearing seems unfair to impartially-minded jurists of the United Kingdom and America;
5. The impartial mind of the Anglo-American is further horrified to find that the whole past of the accused including crimes and bad character is recited publicly before the jury at his trial;
6. The great Anglo-American "test of truth," the cross-examination, appears to be totally ignored by the French;
7. The French jury which is composed of three judges and seven laymen who deliberate together on the guilt or innocence of the accused appears oppressive and dictatorial to many Anglo-Americans;
8. The use of the *dossier* at the trial has also been subject to much criticism.

Even more incredible is the fact that French jurists often look upon Anglo-American criminal procedure with the same skepticism, distaste and astonishment. For example, we think it right and fair that the preliminary inquiry into crime should be conducted by the police acting *ex parte* and in principle without the participation of the suspect. The French think this grossly improper since they feel that no investigation should be made without the knowledge of the suspect and his right to put forward his own view of the situation at the very beginning. It is hardly necessary to state that most French jurists think that the privilege against self-incrimination is a ridiculous, irrational and sentimental principle of law.

Among the most unusual things that Americans find in regard to English criminal procedure are the following:

1. The traditional pomp and ceremony surrounding Assize time in an English town;
2. The wearing of wigs and gowns and the formal atmosphere which permeates the trial itself;
3. The fact that there is no public prosecutor in the strict sense of the word as Americans understand it;
4. That there is no grand jury;
5. That the judge is, as he is often called, "God in a courtroom," wielding an enormous amount of influence over counsel, witnesses and jury.

The British on the other hand feel that our trials are uncivilized and that if a man is to be convicted, he should at least feel that it was done in a formal atmosphere of justice complete with pomp and ceremony. They feel that the use of grand juries is obsolete and a waste of time and more important, of money. They further feel that their judges who are appointed should wield a certain amount of influence in contrast to American judges who are, for the most part, politically elected or appointed and thus, in many instances, unqualified.

#### POLICE BRUTALITY AND CONFESSIONS

The varying philosophies of England, France and America in regard to their criminal procedures are most clearly seen in the regulations of police brutality and the "third degree" tactics. In France the *police judiciaire* are under the direction of the *procureur de la République* and the *procureur général* in each *Cour d'Appel* district. These men, known as *magistrats* are regarded as being non-partisan and judicial and are subject to the authority of the Minister of Justice. Further, the *Chambre d'Accusation* also exercises a general supervision over the *police judiciaire*. Thus, though the *police judiciaire* are empowered to make investigations or interrogate suspects by virtue of their own office or upon delegation from the *procureur général*, the *procureur de la République*, the *juge d'instruction* or the *préfet*, they are still subject to the theoretical control of non-partisan judicial government officials who have the power to stop any abusive police tactics.

Though this system would appear to be theoretically sound, it has not worked that way in practice. It is a well-known fact that the *police judiciaire* often behave brutally and oppressively. That such practice exists when in theory it should not, is directly related to the philosophy of the French people and their attempts to balance the requirements of society against the liberty of the individual in their

search for truth. The history of criminal procedure in France has created a sense of traditionalism in the people which looks upon the interrogation of the accused as the rational and logical way to obtain truth in contrast to the traditionalism of Anglo-Americans. A philosophy such as this cannot look upon "third degree" tactics or even brutality by the police with as much horror as a people whose philosophy of criminal procedure has evolved through such principles as "no man is bound to incriminate himself."

The modern police force in England was inaugurated over one hundred years ago when Sir Robert Peel, the then Home Secretary, was able in 1829 to establish the Metropolitan Police Force by Act of Parliament. Later Acts directed that justices in Quarter Sessions establish a sufficient police force for each county. Borough police forces were also established which together with the county police were under the control of appointed Crown Inspectors of Constabulary who reported directly to the Home Secretary.

Today, there are four types of police forces in England:

1. The County Police or Constabulary forces which are each controlled by its Chief Constable who has the general government of his force subject to the authority of the Standing Joint Committee composed half of representatives of the justices assembled in Quarter Sessions and half of representatives of the County Council;
2. The Borough Police which forces are each managed by a committee of the Borough Council, known as the Watch Committee;
3. The Metropolitan Police Force which is under the direct control of the Home Secretary;
4. The City of London Police which has the Common Council of the City as its police authority.

It is clear that these forces are separate and yet there is a spirit of free and cordial cooperation which links them together. Besides the direct control over each force there are also the *Judges' Rules* which, as has been noted, act as an indirect compulsion on the police since a judge in his discretion may reject any evidence obtained in violation of the *Rules*. A further influence upon the police is the philosophy of the English people who will not stand for arbitrary, brutal power in the hands of the police and who consequently demand fair and considerate treatment for the accused. It is this "sporting instinct" of the English people which distinguishes them most clearly from the French who will in one breath express fear of the *police judiciaire* and faith in their tactics.

In America, state police are usually composed of municipal, county

and state police forces who work independently from each other and from the public prosecutors. The authority governing these police forces is usually political, lacking in experience and subject to constant change. These are among the basic factors to be considered when deliberating over problems of the "third degree" and police brutality, but will not be taken up here.

The use of "third degree" tactics in America can be better understood if it is remembered that the police risk their lives daily in carrying out their duties towards society. How many policemen and their families are burdened by this heavy thought throughout every day of their lives? While most of the people in the United States work in comparatively morally pleasant occupations, many policemen spend every working day dealing with criminals of every kind in the most dismal surroundings. In an environment of this nature, it is nearly impossible to prevent these men from forming a calloused and cynical attitude towards criminals and consequently, towards many people accused of crime.

Take a policeman who knows that he may someday lose his life in the performance of his duty towards society, let him deal with criminals every day for a number of years, allow him a certain amount of unrestricted power over an accused person and a place where he can exercise that power untrammelled, and you have a situation which is inherently ripe for "third degree" tactics. All that is lacking are the proper circumstances. For example, if the police have captured one member of a criminal gang, they may be tempted to employ "third degree" methods to find out who the other members of the gang are. Or, if the police suspect strongly that a hardened criminal is guilty of a crime but have no evidence other than circumstantial to prove it, they again may strive for the confession, since this is the only way they feel they can convict this man. This same situation existed in France in the 13th century and torture was employed for the same reasons. There can be no doubt that crime today is highly organized while courts and society have more and more handcuffed the police in their interrogation of suspects. Any gangland lawyer will take good advantage of all opportunities and, therefore, police often feel that they must work swiftly and sometimes brutally while society and press heap abuse upon them, demanding in the same breath that a crime be solved and condemning any interrogations of suspects.

Since police brutality and the use of "third degree" tactics admitted-



ly exist, the next question concerns itself with confessions procured by the police through the use of such methods. It is clearly seen that the tests which evolved to exclude confessions on the grounds that they are "untrustworthy" are not to be confused with the entirely separate principle, the privilege against self-incrimination which arose as a reaction to the "ex officio" proceedings of the Star Chamber and Ecclesiastical Court of England. As was pointed out by the Supreme Court, the privilege protects the individual from

[t]he processes of justice by which the accused may be called as a witness and required to testify. Compulsion by torture to extort a confession is another matter.<sup>299</sup>

Thus, the privilege against self-incrimination protects the accused from giving *testimony* under compulsion by making him non-compellable at his trial and by giving him the right to claim his privilege at other proceedings in which *testimony* is to be taken while the exclusionary rule in regard to confessions is based upon the principle of untrustworthiness.

Some states have passed statutes<sup>300</sup> which provide that confessions obtained by "third degree" methods will be excluded from evidence and the Supreme Court of the United States has introduced two more principles under which a confession may be excluded from evidence other than the privilege against self-incrimination or the principle of untrustworthiness.

First, a confession will be excluded from evidence if the manner in which it was procured violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution. If confessions are procured by local or state police in such a way as to "offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental," the Due Process Clause of the Fourteenth Amendment has been violated and the accused has a remedy in the Federal Courts. In *Brown v. Mississippi*,<sup>301</sup> the Due Process Clause was held violated when physical abuse was used to extort a confession. In *Chambers v. Florida*,<sup>302</sup> a confession after intensive interrogation violated the Due Process Clause. Both of these decisions can be interpreted in light of the classical test of untrustworthiness. However, in *Ashcraft v. Tennessee*,<sup>303</sup> where the suspect had

<sup>299</sup> *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937).

<sup>300</sup> For a collection of these statutes see 2 *Baylor L. Rev.* 131 (1950).

<sup>301</sup> 297 U.S. 278 (1936).

<sup>302</sup> 309 U.S. 227 (1940).

<sup>303</sup> 322 U.S. 143 (1944).

been held incommunicado for 36 hours without rest or sleep, the Court held inadmissible a confession obtained during this period and laid down a new test. Violation of the Due Process Clause was based on whether or not conditions and circumstances surrounding the making of the confession were "inherently coercive." As Justice Jackson pointed out in dissent,<sup>304</sup> the Court did not find as a matter of fact that the defendant's freedom of will was impaired but substituted the doctrine that the *situation* was "inherently coercive." In effect, the Court disregarded the issue of untrustworthiness, though it is still implicit within the term "inherently coercive" and engaged in a slight degree of judicial legislation in state police administration.

This policy became more pronounced in *Watts v. Indiana*,<sup>305</sup> where the Due Process Clause was held violated when the accused was arrested on a Wednesday and confessed on the following Tuesday after interrogation in relays. He was held without arraignment, without aid or advice and received little food or sleep. Again, the "total situation" was considered and a new expression was coined, namely, the confession must be the "expression of free choice." This decision clearly indicates that trustworthiness is not the issue but, rather, the emphasis is shifted to police tactics. More recently, in *Payne v. Arkansas*,<sup>306</sup> the Court has emphasized *totality* of conduct in relation to "expression of free choice." The accused was a dull 19 year old Negro who was held incommunicado for three days with very little food and threatened with lynching. The *totality* of conduct was held to violate the Due Process Clause. In a recent case,<sup>307</sup> the Court of Appeals for the Second Circuit in considering similar treatment stated:

This treatment, without convincing explanation of its reasonableness, is sufficient to indicate that the resulting statement was involuntary.<sup>308</sup>

Such a test on its face goes beyond the present Supreme Court test.

Collateral to this major development in policy, a number of other principles have been established in regard to the Due Process Clause. First is the principle that the Federal Courts must make an independent determination of the undisputed facts to see if the Due Process Clause has been violated.<sup>309</sup> Secondly, even though there be sufficient evi-

<sup>304</sup> 322 U.S. 143, 162 (1944).      <sup>305</sup> 338 U.S. 49 (1949).      <sup>306</sup> 356 U.S. 560 (1958).

<sup>307</sup> *Wade v. Jackson*, 256 F. 2d 7 (C.A. 2d, 1958).

<sup>308</sup> *Ibid.*, at 14.

<sup>309</sup> *Thomas v. Arizona*, 356 U.S. 390, 393 (1958); *Malinski v. New York*, 324 U.S. 401 (1945).

dence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause.<sup>310</sup> Another collateral principle is that in each inquiry, the Court must weigh the circumstances of pressure against the power of resistance of the person confessing.<sup>311</sup>

Therefore, beginning with the proposition that physical or psychological coercion<sup>312</sup> will invalidate a confession and violate the Due Process Clause of the Fourteenth Amendment which will in turn vitiate a judgment regardless of other evidence, the Court will then determine the issue of coercion by an independent investigation of the *totality* of circumstances surrounding the making of the confession including the "power of resistance" of the person confessing.

The second principle of exclusion introduced by the Supreme Court may be called the *McNabb* rule and is applicable only to Federal police tactics. In *McNabb v. the U.S.*,<sup>313</sup> the defendants had been held incommunicado by Federal officers for several days and questioned intermittently. The Supreme Court held their confessions inadmissible even though they were not considered involuntary, untrustworthy or even "inherently coercive." Justice Frankfurter reasoned that in Federal cases, the reviewing power of the Court is not confined to Constitutionality, but rather that judicial supervision of the administration of criminal justice in the Federal Courts implies the duty of establishing and maintaining "civilized standards of procedure and evidence." Thus, the confessions were held inadmissible because they were obtained during a period of illegal delay irrespective of their voluntariness or the absence of coercion. The purpose of the rule is not to punish the Federal officers or exclude untrustworthy or coerced confessions, but to eliminate the inducement to hold a suspect illegally for the purpose of building a case against him. In *Mallory v. United States*,<sup>314</sup> the court held that detaining an arrested person for interrogation to establish probable cause prior to arraignment, constitutes un-

<sup>310</sup> *Payne v. Arkansas*, 356 U.S. 560, 568 (1958).

<sup>311</sup> *Thomas v. Arizona*, 356 U.S. 390, 393 (1958); *Fikes v. Alabama*, 352 U.S. 191, 197 (1957); *Stein v. New York*, 346 U.S. 156, 185 (1953).

<sup>312</sup> See *Payne v. Arkansas*, 356 U.S. 560, 561 (1958); *Stein v. New York*, 346 U.S. 156, 184 (1953).

<sup>313</sup> 318 U.S. 332 (1943).

<sup>314</sup> 236 F.2d 701 (App. D.C., 1956), rev'd 354 U.S. 449 (1957). Also see *Rettig v. U.S.*, 239 F.2d 916 (App. D.C., 1956).

necessary delay within Title 18 U. S. C. §5(a), and that a voluntary confession obtained during such delay must be excluded. More recently the *McNabb* rule has been extended to prevent Federal officers who have violated the Fourth Amendment in regard to search and seizures from testifying in *state courts* in regard to the articles so seized.

The Supreme Court, in effect, is using the same indirect method of control over police administration that the English Courts use by virtue of the *Judges' Rules*. While such exclusion rests upon the discretion of the Judge in England, the Supreme Court has made the exclusion, in certain respects, mandatory.

Generally speaking, the situation in America in regard to the exclusion of confessions and "third degree" tactics by the police may be summarized as follows:

1. Confessions may be excluded because they are untrustworthy, using any one of the classical tests;
2. Confessions may be excluded because the privilege against self-incrimination of either Federal or State Constitution has been violated;
3. Some state statutes hold "third degree" confessions inadmissible;
4. Federal Courts will scrutinize the *totality* of circumstances surrounding the making of a confession in state proceedings to see if the confession was coerced in violation of the Due Process Clause;
5. Federal Courts will consider not only Due Process but will also consider "civilized standards of procedure and evidence" in rendering a confession inadmissible when it is procured by Federal officers;
6. State courts under "prompt arraignment" statutes such as Title 18, U.S.C. § 5(a) have treated illegal delay as a mere circumstance in determining whether a confession is "voluntary." Thus, state courts have rejected the philosophy inherent in the *Judges' Rules* of England and the *McNabb* rule which stand for judicial supervision of police administration.

Thus, the French, who have the soundest theory of police supervision fail in their practical application with the result that the *police judiciaire* often use brutal methods. Confessions obtained by such brutal methods will not necessarily be suppressed by exclusionary rules which England and America have developed since everything is kept for evidence in the French trial. It is strange to hear a Frenchman state that he fears the *police judiciaire* but yet remain amoral to such tactics and the use of evidence procured by such means at the trial of an accused person.

In England, there is a certain degree of supervision over the police, both by the officials in charge and by the indirect use of the *Judges' Rules*. Their exclusionary principles in regard to confessions are based

upon the doctrine of untrustworthiness and the privilege against self-incrimination. Police brutality and the use of "third degree" tactics are practically unheard of. It is strange to hear English policemen address criminals as "gentlemen."

In America, the supervision of police forces is for the most part very poor. However, all manner of exclusionary principles have been introduced to suppress confessions taken by brutal or "third degree" methods, including the use of the Due Process Clause and the *McNabb* rule. The fact that such practice still continues indicates rather strongly that the fault lies in supervision and the philosophy of the American people. The great danger in the extension of exclusionary rules of course lies in the release of hardened guilty criminals upon society when in fact the Court *knows* they are guilty of the crime charged.

This anomaly of American criminal procedure will no doubt be thought of as monstrous by our rational French friends.

#### THE PRIVILEGE AGAINST SELF-INCRIMINATION

It will be remembered that the English were faced with many problems when drafting the *Criminal Evidence Act, 1898*, which made the accused a competent witness.

America has been likewise faced with the same problems among which, the most vexing have been caused by the privilege against self-incrimination.

In the general discussion of the privilege against self-incrimination it was seen that the Federal Constitution and various State Constitutions guarantee the privilege in almost all manner of proceedings in which testimony is to be taken. During the trial the privilege protects the accused from being compelled to take the stand and asked a single question under the theory that no relevant fact could be inquired about that would not tend to incriminate him. But, if the accused voluntarily takes the stand, it necessarily follows that he will be cross-examined and at this point the problem arises as to *what* he may be cross-examined upon. In other words, has the accused waived his privilege by taking the stand and how far does this waiver extend? These same problems were handled in England by the *Criminal Evidence Act, 1898*, which specifically set out the extent of waiver as well as the limitations upon the prosecution to introduce evidence of the bad character of the accused when he has not put his character in issue. France, on the other hand, allows interrogation of the accused by offi-

cials ranging from the *police judiciaire* to the president of the *Cour d'Assise* the scope of which is, practically speaking, unlimited so that the jury is fully aware of any and all past crimes of the accused as well as bad character evidence. America has, on the whole, attacked the situation differently.

It must be remembered that in America, when the accused does take the stand, he occupies a double position, as the *accused* and as a *witness*. England has ignored this distinction. As the accused, there is a well-established rule that the prosecution may not introduce evidence of the character of the accused for the purpose of raising an inference that the defendant is guilty of the crime for which he is being tried, because such evidence would be prejudicial. Thus, as the accused, he has the right to object to all evidence of the prosecution tending to show his bad character unless he has put his character in issue by introducing evidence of his good character. As a witness, however, it has been universally held that the accused may be impeached just like any other witness according to the law in the particular jurisdiction.<sup>315</sup> The attack upon the accused as a witness is directed at his *veracity* and not as *evidence* that he committed the crime, which means that in some jurisdictions the accused may only be impeached by his character for *veracity* while others hold that he may be impeached because of general bad character or a specific bad trait. Depending on the jurisdiction, the prosecutor in seeking to impeach the accused as a witness is limited to the particular methods specified for impeachment. Thus, in attempting to attack the credibility of the accused as a witness on cross-examination, questions may be asked, depending on the jurisdiction involving general bad character, conviction of crime or specific instances of misconduct. This attack upon the credibility of the accused as a witness is not involved with the privilege against self-incrimination unless, as will be seen, the prosecution attacks the *veracity* of the accused by trying to *prove* another crime on cross-examination.

In his position as the accused, it is generally held that in volunteer-

<sup>315</sup> "The defendant appeared before the Court in the dual capacity of an accused and that of a witness. As an accused, his character was not subject to attack unless he opened the question. As a witness, his position was different; his credibility was subject to attack. . . . As a defendant, his character could not be impeached, that issue not having been opened by him. As a witness, it could be impeached, as the character of any witness may be subjected to that test. In other words, he may be unworthy of belief, but this unworthiness is not to be considered in determining whether or not he is guilty; while the attack upon the character of an accused is for the purpose of establishing that his plea is not supported by his attempt at proving character and that he is guilty."

ing to take the stand, he waives the privilege against self-incrimination in varying degrees in the different jurisdictions.

Thus, the problems of *waiver* and *character* that England solved by clear statutory legislation, have been left unsolved in America because of varying theories of waiver and dual capacity of the accused which complicates the introduction of the bad character of the accused into evidence.

#### SILENCE OF THE ACCUSED

During the discussion of the silence of the accused under English law it was noted that it has long been a general rule in the weighing of evidence that whenever a litigant is peculiarly able to offer evidence which would elucidate the facts and fails to do so, an inference arises that the production of such evidence would be unfavorable to his cause. This principle can be justified upon the theory that the state of the mind is evidence, and that refusal to testify might indicate the state of mind of a given defendant. Accordingly, unfavorable inferences have been drawn under the most varied circumstances; the failure of a defendant to produce in court a jewel whose value was in question;<sup>316</sup> the failure of a defendant in an automobile case to call two people who were riding with him;<sup>317</sup> the failure of a defendant in a real property action to call the party through whom he claimed title.<sup>318</sup> The above examples are taken from civil cases but the same rule is found to apply in criminal cases with regard to the failure of the accused to produce evidence, other than his own testimony, when it is in his power to do so.<sup>319</sup> Further, the silence, speech or other conduct

<sup>316</sup> *Armory v. Delamiric*, 1 Strange 505 (1722) where the jury was instructed to presume the jewels to the value of the *best jewels* as a measure of their damages. Lord Mansfield, in *Blatch v. Archer*, 1 Cowp. 64, 65 (1774) states that: "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted." Best, in *R. v. Burdett*, 4 B. & Ald. 122 (1820) stated: "If the opposite party has it in his power to rebut it by evidence, and yet offers none, then we have something like an admission that the presumption is just. . . . The law does not impose impossibilities on parties; it expects that a man who has the means of knowing who may be witnesses shall call them."

<sup>317</sup> *Reetz v. Mansfield*, 119 Conn. 563, 178 Atl. 53 (1935).

<sup>318</sup> *Hall v. Vanderpool*, 156 Pa. 152, 26 Atl. 1069 (1893).

<sup>319</sup> "Since it was obviously within the power of the defendant to produce such evidence, his failure to do so gives rise to a presumption, under well-known rules, that if introduced it would have been unfavorable to him. . . . It is, of course, now well settled that our statute providing that no presumption of the guilt of the defendant shall arise from his failure to testify in his own behalf, has application only to the personal testimony of the defendant himself and does not extend to apparently available testimony of others." *Ford v. State*, 184 Tenn. 443, 201 S.W.2d 539, 541 (1945).

of the accused *outside* of the courtroom and of legal custody with respect to a crime of which he is accused have long been regarded as admissible evidence at his trial.<sup>320</sup> This principle is again sustained on the theory that the state of mind of the accused is evidence and that such conduct indicates the state of mind which results in the use of such terms as "consciousness of guilt."<sup>321</sup> In civil cases, if a party opponent remains silent when he could be a useful and natural witness, the courts have almost unanimously held that this creates an adverse inference.<sup>322</sup> Thus, it can be said that the failure of a party to a civil suit to introduce evidence or to testify when it would be most natural for him to do so will give rise to an adverse inference that may act as affirmative evidence of his liability. In criminal cases, the acts or silence of the accused outside of court or his failure to call evidence when it would be natural for him to do so, may act as affirmative evidence of his guilt.

The privilege against self-incrimination permits the accused in a criminal case to refrain from giving any testimony. In this light, the problem is presented whether an adverse inference should arise if the accused exercises his privilege. There should be no adverse inference

<sup>320</sup> "From time immemorial the reply or silence of the accused person, when charged, has been regarded as legitimate evidence on his trial for the consideration of the jury. Any act of his, when charged, tending to sustain the charge, may be proved. Fleeing from arrest, giving contradictory, untrue, or improbable accounts of the matters in issue, and refusals to account for the possession of stolen property, are evidence of guilt admitted upon the trial of the persons accused. These are proofs derived from the prisoner's acts, sayings and silence." *State v. Bartlett*, 55 Me. 200, 217, 218 (1867).

<sup>321</sup> "The law says that a man is to be judged by his consciousness of the right or wrong of what he does, to some extent. If he flees from justice because of that act, goes to a distant country and is living under an assumed name because of that fact, the law says that is not in harmony with what innocent men do, and jurors have a right to consider it as evidence of guilt, because he is an eyewitness to the occurrence; he knows how it did transpire; he is presumed to have consciousness of that act. . . . It is a principle of human nature—and every man is conscious of it, I apprehend—that if he does an act which he is conscious is wrong, his conduct will be along a certain line. He will pursue a certain course not in harmony with the conduct of a man who is conscious that he has done an act which is innocent, right and proper." *Starr v. United States*, 164 U.S. 627, 631 (1897).

<sup>322</sup> In *Attorney-General v. Pelletier*, 240 Mass. 264, 316, 134 N.E. 407, 423 (1922), a district attorney was removed for misconduct of office. This type of case most closely resembles a criminal prosecution. The court said: "Instant impulse, spontaneous anxiety and deep yearning to repel charges thus impugning his honor would be expected from an innocent man. Refusal to testify himself or to call available witnesses in his own behalf under such circumstances warrants inferences unfavorable to the respondent. It is conduct in the nature of an admission. It is evidence against him. The principle of law has long been established and constantly applied. The reason is that it is an attribute of human nature to resent such imputations. In the fact of such accusations, men commonly do not remain mute but voice their denial with earnestness, if they can do so with honesty. Culpability alone seals their lips."



simply because the accused exercises his privilege. If at all, the adverse inference should arise because the accused has not disproved evidence that it was in his power to disprove. That the jury may naturally gain an unfavorable inference from the failure of the accused to testify cannot be argued but to invite or demand such an inference through comment by the prosecutor or judge presents a different problem.<sup>323</sup>

A majority of the states have statutes which contain express clauses which provide that no presumption shall arise from the failure of the accused to testify or that his silence shall not be subject to comment.<sup>324</sup> However, several of the states, by design or inadvertence did not provide against comment by the prosecutor or judge so that today in these states an inference may be drawn.

Generally speaking, these states whose decisions allow comment will not permit an inference to be drawn unless the State has proved a *prima facie* case in keeping with its burden of proof.<sup>325</sup> Secondly, they do not allow the inference to be drawn unless there is independent, adverse evidence which it is in the power of the accused to explain or refute.<sup>326</sup> Theoretically then, these states do not permit comment upon the mere fact of the accused's failure to testify but upon his failure to deny incriminating evidence which it is in his power to deny.

In discussing the weight of such inferences, the Connecticut courts have repeatedly held that the jury may draw any inference as to his guilt which is reasonable under the circumstances.<sup>327</sup> California has held that the jury may consider the failure of the accused to deny or explain the evidence against him as tending to indicate the truth of such evidence.<sup>328</sup> New Jersey has held that the failure of the accused

<sup>323</sup> The federal test for comment is: "[W]hether the language used is manifestly intended to be, or is of such character that the jury would naturally and necessarily take it to be comment on accused's failure to testify." *Morrison v. United States*, 6 F.2d 809, 810 (C.A.8th, 1925).

<sup>324</sup> 28 N.Y.U. L. Q. 1049 (1953).

<sup>325</sup> "The question immediately arises as to how much evidence the state must produce before the trier is permitted to apply the inference. Obviously that state must first produce some evidence of guilt. The state must produce a case where the evidence, apart from the inference, would be sufficient to go to a jury. . . . If the state has supported its burden of proof, then the jury may throw its inference arising from the failure of the accused to testify in his own defense into the scale to determine the ultimate question of guilt or innocence." *State v. McDonough*, 129 Conn. 483, 484, 29 A.2d 582, 583 (1942).

<sup>326</sup> *State v. Christy*, 26 N.J. Super. 459, 98 A.2d 118 (1953); *People v. Greenberg*, 73 Cal. App. 2d 675, 167 P.2d 214 (1946).

<sup>327</sup> *State v. Hayes*, 127 Conn. 543, 18 A.2d 895 (1941).

<sup>328</sup> *People v. Adamson*, 27 Cal. 2d 478, 165 P.2d 3 (1946).

to testify on his own behalf raises a strong presumption that he could not truthfully deny those facts.<sup>329</sup> Ohio indicates that such failure tips the scales of evidence against the accused.<sup>330</sup> Therefore, the probative legal effect of the accused's failure to testify varies in degree depending on the jurisdiction.

The arguments in favor of comment are as follows:

1. An inference from the refusal to testify is inevitable; therefore why try futilely to avoid it.<sup>331</sup>
2. An innocent defendant can have no reason for refusing to testify.<sup>332</sup>
3. There is no compulsion to testify; for the accused has an option, and the exercise of this option, by choosing silence, is therefore, a voluntary act of his own.<sup>333</sup>
4. In jurisdictions where comment is permitted, it has achieved most satisfactory results.

The arguments against comment are as follows:

1. Comment is unjust when it results in the situation where the defendant must choose between being subjected to a cross-examination of past offenses and remaining silent.<sup>334</sup>
2. Right of comment would cause prosecutors to become less diligent.
3. The effect of comment is in violation of the privilege against self-incrimination.

<sup>329</sup> *State v. Marinella*, 24 N.J. Super. 49, 93 A.2d 620 (1952).

<sup>330</sup> *State v. Cott*, 58 Ohio App. 439, 16 N.E. 2d 788 (1937).

<sup>331</sup> "His declining to avail himself of the privilege of testifying is an existent and obvious fact. It is a fact patent in the same. The jury cannot avoid perceiving it. . . . The silence of the accused—the omission to explain or contradict, when the evidence tends to establish guilt is a fact—the probative effect of which may vary according to the varying conditions of the different trials in which it may occur—which the jury must perceive, and which perceiving they can no more disregard than one can the light of the sun when shining with full blaze on the open eye." *State v. Cleaves*, 59 Me. 298, 300 (1871).

<sup>332</sup> "The defendant in criminal cases, is either innocent or guilty. If innocent, he has every inducement to speak the facts, which would exonerate him. The truth would be his protection. There can be no reason why he should withhold it, and every reason for its utterance." *Ibid.*, at 301.

<sup>333</sup> "The constitutional privilege goes no further historically or logically than to prevent the employment of legal process to compel an accused to incriminate himself by what he may say on the witness stand. He cannot be compelled to testify against his will. The privilege of refraining from testifying, if he so elect, does not protect him from any unfavorable inference which may be drawn by his triers from his exercise of the privilege. . . . There is no actual compulsion upon the accused to testify, and, when he elects not to do so, he is obviously not being compelled to give evidence against himself." *State v. Ford*, 109 Conn. 490, 146 Atl. 828, 830 (1929).

<sup>334</sup> The unfairness of this situation is exemplified by those states which hold that by taking the stand, the accused has waived his privilege of self-incrimination as to all facts including other offenses which he is not then on trial for. It is also argued that: "[m]any people, innocent or guilty, when called to the witness stand are timid, and do not present the best side of their character, or the best side of their claim in the presence of the judge and jury during the trial of the case." John C. Price in 13 J. Crim. L. & Criminology 293 (1922).

## CONCLUSION

## THE DILEMMA OF PRINCIPLES

Because of the many collateral problems that arose when the accused was made a competent witness, the Anglo-American trial might, in some respects, be termed the "dilemma of principles."

The basic reason for making the accused competent was the widespread feeling that the refusal to allow him to testify was an injustice. Today, the accused has the right to testify while the privilege against self-incrimination gives him the right to refrain from testifying. However, if the accused does not testify, he naturally suffers from an adverse inference and, in some jurisdictions, from comment on his failure to testify by the judge or prosecutor. Many jurists feel that such comment acts as a moral coercion on the accused to testify and, in effect, vitiates the privilege against self-incrimination. If the accused does take the stand, he waives the privilege against self-incrimination to varying degrees in different jurisdictions thereby opening the door to cross-examination which, in many instances, goes beyond the crime for which the accused is being tried. This cross-examination is often aggravated by an "over-zealous" prosecutor. Finally, though the prosecutor cannot introduce evidence of the bad character of the accused for the purpose of raising an inference that the latter is guilty of the crime for which he is being tried, the prosecutor can, by hypocritical legal rationalization, introduce the same evidence in many jurisdictions to impeach the accused in his dual capacity as a witness.

French jurists, for the most part, are astonished at this hodgepodge of hypocritical reasoning which characterizes the introduction of evidence in an American criminal trial. They are shocked at the technical application of rules such as those applied for suppression of evidence and exclusion of confessions which will allow acknowledged guilty persons to go free. However, to many jurists, the most bewildering feature of the jurisprudence of American criminal procedure is the fact that despite its irrationality, American jurists loudly acclaim the justice of their system while gazing with horror upon the French system.

French jurists will be quick to point out that in many aspects, the practical effects of some American state criminal systems are nearly the same as those in France. For example, in France, the accused does not have to answer questions propounded to him at his trial, but if he refuses, this fact will weigh heavily against him. The French feel that

the effect is nearly the same in those American jurisdictions which allow comment on the failure of the accused to testify. In France, the accused has no privilege against self-incrimination, per se, and can be questioned on almost anything, including other crimes. The French feel that the effect is almost the same in those American jurisdictions where the accused, by testifying, waives almost completely, his privilege against self-incrimination. In France, the bad character of the accused, including past offenses, is considered by the jury in its deliberations. The French feel the effect is almost the same in those American jurisdictions where the bad character of the accused, as well as his past offenses, are made known to the jury in order to impeach him as to credibility. Furthermore, in France, the interrogation of the accused is carried on by an impartial judge without cross-examination as Anglo-Americans know it. French jurists feel that the American system of cross-examination of the accused by a prosecutor is more likely than their system of interrogation, to miscarry as a "test of truth."

In England, the legislature carefully considered the effects of making the accused competent before adopting the *Criminal Evidence Act, 1898*. They preserved the privilege against self-incrimination by making the accused non-compellable and prohibiting comment by the prosecution. However, the Act has been interpreted to allow comment by the judge if the accused remains silent when it is peculiarly within his power to elucidate or explain a prima facie case against him. This is the rule in some American jurisdictions. England also preserved the right to make an unsworn statement which, though of uncertain interpretation, is a valuable method by which the accused may tell his story and yet escape cross-examination and also avoid any adverse inferences which might arise from his failure to testify. The *Criminal Evidence Act* specifically prohibits the introduction into evidence of any past crimes or bad character of the accused unless: (1) A past offense is admissible evidence to show that he is guilty of the offense wherewith he is then charged; or (2) He has asked questions of the witnesses for the prosecution with a view to establishing his own good character; or (3) Has given evidence of his good character; or (4) Has made imputations on the character of the prosecutor or his witnesses; or (5) Has given evidence against any other person charged with the same offense.

Thus, in England, the accused does not waive his privilege against self-incrimination except as to the crime charged where he takes the

stand. The accused also does not occupy a double role as accused and witness and therefore, cannot be impeached by proof of prior crimes or bad character, as in the United States, unless he puts his character into issue by one of the ways specified in the Act.

#### PROPOSALS

There are some who point out that most of the problems of American criminal procedure, discussed herein, would be solved if the accused was again made incompetent. No adverse inferences could arise because the accused did not testify and no comment could be made upon this fact since the accused would be powerless to testify. There could be neither an over-zealous cross-examination of the accused nor the problem as to the extent of waiver of the privilege against self-incrimination. Finally, character evidence, used to impeach the accused as a witness, could not be introduced into evidence. Though some reactionaries feel that the testimony of the accused is valueless, others feel that the accused should be allowed to tell his story in the form of an unsworn statement with cross-examination by the judge, at his discretion, and comment thereon.

A more radical proposal would do away with the privilege against self-incrimination at the trial and make the accused compellable at the discretion of the judge. This would obviate any adverse inference or comment on the failure of the accused to testify. If the accused is compelled by the judge to testify, he should only be cross-examined by the judge. The prosecutor and defense counsel should be able to propose questions to the judge who may ask them of the accused as he sees fit. A system such as this would eliminate problems as to the waiver of the privilege against self-incrimination, the over-zealous prosecutor and character evidence. Such a proposal is supported because trials today are in public. The accused is tried by an impartial judge and jury and is protected by counsel as well as countless other safeguards by way of review and otherwise. Under circumstances such as these, there is little danger of injustice. Society has changed since the time when the privilege against self-incrimination grew out of a fear of arbitrary power in the hands of the government. Today, in a criminal trial, there can be no exercise of arbitrary power and, therefore, the privilege against self-incrimination, which in this regard has outlived its purpose, often will act unjustly upon the accused as was seen in the prior discussion.

It would also seem that much benefit could be gained from a study of the English *Criminal Evidence Act, 1898* with a view to adopting similar legislation. In any event, it is clear that the stagnant state of present American criminal procedure can best be relieved by clear legislation based upon intense study of the problems by groups such as the Judicial Conference of the United States or the American Bar Association.

Change and progress in criminal procedure will not come easily, nor will it come swiftly. It is first necessary to dispel all the fears and misgivings that a secure people have when they are asked to give up or change some of their traditional methods of trial. This is made more difficult because the arguments of progress are rational while those of traditionalism are often emotional. To begin with, studies such as this must be made to create a new sense of security in progress through understanding so that public opinion will accept conservative change. It is hoped that this historical and comparative survey will in some measure contribute to that sense of security in progress and aid in the achievement of clearer thinking in this age of complicated criminal procedure.

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